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The Application of Federal Laws in . . .

American Samoa

Guam

The Northern Mariana Islands

The U.S. Virgin Islands

VOLUME 2 — U.S. Code Titles 17-39

Department of the Interior
Office of the Solicitor
Washington, D.C.

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Department of the Interior
Bruce Babbitt, Secretary

Office of the Solicitor
Ruth G. Van Cleve
Washington, D.C.

October 1993

Title 17 - COPYRIGHTS

** Contains recommendations for changes in the law.

Memorandum
Number

Subject

17 U.S.C.
sections

17-1

** Copyrights

101-914

Memorandum No. 17-1
October 1985
March 1986

Subject: Title 17 of the United States Code
Copyrights^{1/}

Purpose: To afford protection to the author of literary works, musical works, and other "original works of authorship fixed in any tangible medium of expression" (17 U.S.C. 102).

Territorial Application: The Federal copyright laws apply fully in the Virgin Islands, Guam, and the Northern Marianas. They do not apply within American Samoa or the Trust Territory, but American Samoans can obtain copyright protection elsewhere in the United States, and Micronesians who are U.S. domiciliaries can also do so. The law pertaining to the transmission by cable television to the public of a videotape obtained as a result of a transmission by a television broadcast station contains a lenient provision that applies to Guam, the Northern Marianas, and the Trust Territory, and arguably to the Virgin Islands and Samoa as well.

Recommendation: The application of the Federal copyright laws to the Virgin Islands, Guam, and the Northern Marianas ought not to be disturbed. There does not appear to be any immediate, pressing need to include American Samoa among the areas in which they apply, but when it is convenient to do so, the law ought to be modified to recognize Samoa. Given the Trust Territory's changing status, it requires no further attention now in the copyright laws. The particular provision concerning transmission by cable systems in offshore areas (17 U.S.C. 111(e) and (f)) is doubtless of value to them, but it

^{1/} Given the content of this Title, it does not seem necessary to analyze it by chapter. The headings of the nine chapters, and their section numbers, are the following: 1., Subject Matter and Scope of Copyright, secs. 101-118; 2., Copyright Ownership and Transfer, secs. 201-205; 3., Duration of Copyright, secs. 301-305; 4., Copyright Notice, Deposit, and Registration, secs. 401-412; 5., Copyright Infringement and Remedies, sec. 501-510; 6., Manufacturing Requirements and Importation, secs. 601-603; 7., Copyright Office, secs. 701-710; 8., Copyright Royalty Tribunal, secs. 801-810; and 9., Protection of Semiconductor Chip Products, secs. 901-914.

appears to contain an inconsistency that ought to be corrected.

Discussion: The copyright laws in general. The United States Constitution, in Article I, Section 8, Clause 8, grants to the Congress the power

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

From 1790 forward, the Congress has carried out this power by enacting copyright laws--which, together with the patent laws and trademark laws (considered in Memoranda No. 35-1 and 15-5(j)) and various other laws, constitute what are sometimes called the Intellectual Property Laws. The copyright laws were most recently revised in a major way in 1976, in the Copyrights Act of that year, to become effective for the most part on January 1, 1978. They are codified as positive law in Title 17.

The copyright laws provide protection to "original works of authorship fixed in any tangible medium of expression . . ."; from which they can be perceived, reproduced, or otherwise communicated . . . "; and such works of authorship include

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings. (17 U.S.C. 102 (a))

Provision is made for, among other things, the ownership of the copyright and how it may be transferred (17 U.S.C. 201); the notice of copyright and how it may be registered (17 U.S.C. 401, 408); and the duration of the protected term, now

in general the author's life plus fifty years (17 U.S.C. 302(a)). None of the general provisions of the copyright laws make special provision for the offshore areas (except for the cable television section, discussed below), and none is known to create any peculiar problems for them.

Territorial application.

The copyright laws extend to an author who is "a national or domiciliary of the United States" (17 U.S.C. 104(b)(1)), and to works first published "in the United States" (17 U.S.C. 104(b)(2)). When the term "United States" is used in these provisions, as in other sections of Title 17, it is usually used in a geographical sense, and when so used it is defined to comprise

the organized territories under the
jurisdiction of the United States
Government. (17 U.S.C. 101)

That definition is unusual in Federal law, but not difficult to apply.^{2/} An "organized territory" is one for which the Congress has provided an organic act (United States v. Standard Oil Co., 404 U.S. 558, 559 n. 2 (1972)), and both the Virgin Islands and Guam are the subjects of such acts (48 U.S.C. 1541, et seq., 1421, et seq., respectively). American Samoa is not. Nor is the Trust Territory, which is not in any event a "territory" of the United States as a matter of law.

^{2/} Title 17 as it appears in the United States Code is replete with historical and revision notes of great length, following almost all sections of the Title and derived from the Report of the House Judiciary Committee (H. Rept. 94-1476, 94th Cong. (1976)) that gave rise to the Copyrights Act of 1976. Regrettably, as to the definitions section (17 U.S.C. 101), the note states that the "significant definitions in this section will be mentioned or summarized in connection with the provisions to which they are most relevant". A careful search reveals no occasion in which any note elaborates upon or even refers to the definition of "United States" or "State".

Whether the Northern Marianas will, upon trusteeship termination, when the Commonwealth of the Northern Mariana Islands ascends to a de jure existence, then have the status of an "organized territory" is, perhaps mercifully, a question that need not here be considered. That is so because the copyright laws unarguably have been extended to it by operation of law, under section 502(a)(2) of the Northern Marianas Covenant. That section makes applicable to the Northern Marianas, effective January 9, 1978, such laws of the United States in effect on that date as are "applicable to Guam and which are of general application to the several States . . .". Title 17 is such a law.

Title 17 contains one other definition of interest, that of the term "State", which "includes . . . any territories to which this title is made applicable by an Act of Congress" (17 U.S.C. 101). That definition leads to the same result: the Virgin Islands, Guam, and the Northern Marianas are included; Samoa and the Trust Territory are not. This follows from either the "Act of Congress" represented by the definition of "United States", discussed above, and appearing in the same section of Title 17, or from an examination of other laws: the 1936 Organic Act of the Virgin Islands made the copyright laws applicable to the Virgin Islands (48 U.S.C. 1405g) and the 1954 Organic Act perpetuated that application (48 U.S.C. 1574(c)); the copyright laws were expressly extended to Guam by section 24 of the 1956 Guam Omnibus Act (70 Stat. 908, 911, 48 U.S.C. 1421n).^{3/} Extension to the Northern Marianas follows by operation of section

^{3/} The Commission on the Application of Federal Laws to Guam concluded, in its 1951 report, that the copyright laws "probably" applied to Guam, but recommended legislation to clarify the matter in light of the explicit extension of the copyright laws to the Virgin Islands (H. Doc. 212, 82 Cong., p. 6, para. 23). The 1956 Act implemented portions of the Commission's recommendations, and in its legislative history discusses the copyright question (1956 U.S. Code Cong. and Admin. News 4062, 4071-72). The copyright laws that the Guam Commission examined in 1951 did not contain the definitions of "United States" and "State", discussed above, that are contained in the present law. At that time, therefore, the question of applicability to Guam could not be answered with the confidence that is possible today.

502(a)(2) of the Covenant. But there are no comparable of Federal laws extending the copyright laws to Samoa or the Trust Territory.

The purpose of the 1976 copyright law was to preempt the subject matter for Federal action, and to abolish the earlier dual Federal-State system of copyright regulation that had proved complex and confusing. The legislative history states that

One of the fundamental purposes behind the copyright clause of the Constitution, as shown by Madison's comments in The Federalist, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. (1976 U.S. Code Cong. and Admin. News 5745)

And further:

The intention [of the 1976 law] . . . is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright . . . (1976 U.S. Code Cong. and Admin. News 5746).

In light of the foregoing, the Congress has preempted the subject matter of copyrights with respect to the Virgin Islands, Guam, and the Northern Marianas. It has not done so in the case of Samoa or the Trust Territory. But because a copyright may be obtained by a person who is not a citizen of the U.S., but who is instead either "a national or domiciliary of the United States" (17 U.S.C. 104(b)(1)), United States copyright protection is available to Samoans in general and to

Trust Territory citizens who are also U.S. domiciliaries.^{4/} That protection, however, would not extend to the Samoan or Micronesian author "at home" in Samoa or the Trust Territory, because the Federal law does not extend to either Samoa or the Trust Territory.^{5/}

Beyond that, both Samoa and the Trust Territory could if they chose enact their own copyright laws. The field has not been preempted as to them. Neither has done so, and it is likely that no need has arisen in either area that has required giving attention to this subject. Should a need arise in the case of Samoa, or should a convenient legislative vehicle for the purpose appear, Federal legislation to extend the copyright laws to Samoa should be considered. The familiar problem arising from the lack of a Federal district court in Samoa, or of one having jurisdiction in Samoa, would need to be dealt with, because copyright infringement jurisdiction reposes only in the Federal courts (17 U.S.C. 502, 508).

^{4/} Samoans are, for the most part, nationals but not citizens of the United States. When the term "United States" is used in connection with nationality status, as in 17 U.S.C. 104(b)(1)--in referring to a "national . . . of the United States"--the term is thus used in a political instead of a geographic sense. In the context of nationality status, the term "United States" in a geographical sense would be without meaning. Micronesians in the Trust Territory are almost entirely aliens under U.S. law.

^{5/} The copyright laws do not have "extraterritorial" application, a term often used in judicial decisions concerning copyrights, and meaning application beyond the areas defined as within the United States by 17 U.S.C. 101. As an example, in Robert Stigwood Group Ltd. v. O'Reilly, 530 F.2d 1096 (1976), the Court of Appeals for the Second Circuit was concerned with unauthorized performances of "Jesus Christ Superstar" in both the United States and Canada. It allowed the copyright holder to collect damages for copyright infringement for the U.S. performances, but not for those in Canada. The court observed that the copyright laws have no extraterritorial application, and while the Canadian performances may have been torts in Canada, they were not torts in the U.S. (at p. 1101).

As to the Trust Territory, it is likely that the trusteeship will be terminated well before copyright laws constitute a matter of moment there. The subject will then be the responsibility of the new Freely Associated States.

Cable television transmission.

The current copyright law deals with the issue of copyright infringement by cable television systems. Typically, cable television systems pick up broadcasts of programs originated by others (known as "primary transmissions") and retransmit such programs to their paying subscribers (known as "secondary transmissions"). The law provides in general for the payment of copyright royalties by the cable company to the primary transmitter when the cable company engages in the secondary transmission (17 U.S.C. 111). In addition, the law generally does not permit--except in one instance applicable to offshore areas--a cable system to tape or otherwise record a program off-the-air and then to retransmit the program later to its subscribers (17 U.S.C. 111(e)). Differently stated, in most circumstances cable systems must retransmit simultaneously with their receipt of the primary transmission. To do otherwise constitutes an act of copyright infringement, to which both civil and criminal penalties may attach.

As to the exception for offshore areas, the note following 17 U.S.C. 111 refers first to the general bar to nonsimultaneous transmission by a cable company of a primary transmission that it has recorded, and then states:

The one exception involves cable systems located outside the continental United States, but not including cable systems in Puerto Rico, or, with limited exceptions, Hawaii. These systems [outside the continental United States] are permitted to record and retransmit programs under the compulsory license [from the Federal Communications Commission], subject to the restrictive conditions of subsection (e), because off-the-air signals

are generally not available in the offshore areas.

A problem of internal inconsistency in 17 U.S.C. 111 arises, however, from the different language appearing in subsections (e) and (f). At 17 U.S.C. 111(e), nonsimultaneous transmissions by a cable company are actionable as acts of infringement unless they occur in Alaska or in parts of Hawaii or

in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands . . . (17 U.S.C. 111(e)(2)).

But at 17 U.S.C. 111(f), a "cable system" is defined as one "in any State, Territory, Trust Territory, or Possession" that receives signals from a television broadcast station and makes secondary transmissions to its subscribers; and a "secondary transmission" is one transmitted simultaneously with the primary transmission, except that it may be nonsimultaneous if the cable system is

not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico.

The 17 U.S.C. 111(f) language in both instances is obviously broader than that of 17 U.S.C. 111(e), because it comprehends the Virgin Islands and American Samoa, while section 111(e) does not. The anomalous result is that a nonsimultaneous secondary transmission by a cable system in the Virgin Islands or American Samoa could be actionable under 17 U.S.C. 111(e)(2) as an act of copyright infringement, even though the definition at 17 U.S.C. 111(f) is designed to foreclose that result. The Copyright Office advises that these conflicting provisions had different origins, with one being devised on the House side, the other in the Senate; and that Office is also of the view that Samoa and the Virgin Islands are treated differently under the two subsections--whether intentionally or not cannot be proved, either way.

Should the issue arise, one can hope that a decisionmaker might conclude that the Virgin Islands and Samoa are among the beneficiaries of the exception contained in section 111(e)(2), even though they are not named therein, inasmuch as the official note (quoted above) describes the broader impact of 111(f), which clearly includes them. But the matter should be resolved and the inconsistency removed by corrective legislation.

Conclusion: The copyright laws should, when a practical need arises or when a convenient legislative vehicle is at hand, be extended to American Samoa. In addition, an inconsistency in the treatment of the offshore areas in 17 U.S.C. section 111, pertaining to cable television companies, ought to be corrected.

Federal agency comments: Comments were invited from the Department of Justice and the Copyright Office. All comments received have been reflected above.

Title 18- CRIMES AND CRIMINAL PROCEDURE

- Contains nothing of substantial interest to the territories.
- * Contains matters of particular interest to the territories, but no legislative recommendations.
- ** Contains recommendations for changes in the law.

<u>Memorandum Number</u>	<u>Subject</u>	<u>18 U.S.C. sections</u>
18-1	** Part I. Crimes	1-2710
18-2	* (a) Part II. Criminal Procedure	3001-3772
	** (b) Part III. Prisons and Prisoners	4001-4353
	** (c) Part IV. Correction of Youthful Offenders	5001-5042
	* (d) Part V. Immunity of Witnesses	6001-6005

Appendix:

- Interstate Agreement on Detainers Act
- Classified Information Procedures Act

Memorandum No. 18-1
July 1987
Revised May 1993

Subject: Title 18 of the United States Code
Crimes and Criminal Procedure

Part I. Crimes (18 U.S.C. 1-2710)

Comment: Part I of Title 18 defines actions that constitute crimes under Federal law and prescribes the penalties for their commission. It is not the exclusive source for the definition of Federal crimes, because Federal laws appearing elsewhere in other titles of the United States Code--and dealt with in this study in connection with those other titles--make certain other actions Federal crimes as well. This memorandum, thus, deals solely with the crimes set forth in Part I of Title 18. Other crimes are dealt with in the memoranda pertaining to the titles in which they appear.

Owing to broad definitions contained in the Title, as discussed below, these Federal laws apply for the most part in the Virgin Islands, Guam, Samoa, and the Northern Marianas precisely as they apply in the States. But they do not do so in all instances, either because of peculiarities in the wording of some sections or because of the absence of a definition of the term "State". Sections of Part I of Title 18 that present these problems are cited and discussed below, along with other sections that either warrant comment or warrant legislative change.

There would be no useful purpose served by a discussion, chapter-by-chapter or section-by-section, of Part I of Title 18, inasmuch as most of the Part presents no problem for the territories. (A brief description of the contents of all such Chapters, through Chapter 119, appears at pages 395-406 of the Report of the Northern Marianas Commission on Federal Laws.) Accordingly, there appear below references only to those sections, in the order in which they appear in Part I, that warrant comment as described above. There are included below discussions of all sections of Part I about which the Northern Marianas Commission recommends changes (Report, pp. 125-138).

Following the discussion of those sections, there appears (under "Conclusion"), a summing up, in which sections that

present the same problem (e.g., the absence of a definition of "State") are cited together--with the objective of facilitating any later drafting process.

Note: Added in 1993: The Crime Control Act of 1990, Public Law 101-647, 104 Stat. 1990, approved November 29, 1990, contained many amendments recommended in this memorandum. If the section identified below as requiring modification was amended by Public Law 101-647, that fact is noted in a footnote.

Discussion: Definitions. Early in Part I there appear definitions that answer most questions concerning the application of Title 18 to the territories.

Section 5 of Title 18 defines "United States", when used in a territorial sense, to include

all places and waters, continental or
insular, subject to the jurisdiction of
the United States

Those words comprehend all of the territories. They comprehended as well the former Trust Territory, for which the United States had "full powers of . . . jurisdiction" under the Trusteeship Agreement, but they do not comprehend the new Freely Associated States of Micronesia.

Section 10 of Title 18 defines "interstate commerce" to include

commerce between one State, Territory,
Possession, or the District of Columbia
and another State, Territory,
Possession, or the District of Columbia.

The territories, which are also "possessions" as a matter of law, are included within those words.

As earlier noted, Title 18 contains no general definition of the word "State", and as will appear in the discussion below of sections that present difficulties, this absence sometimes creates a problem. There are frequent definitions of the term for purposes of particular sections or chapters of Title 18 (e.g., 18 U.S.C. 1028(d)(5), 1955 (b)(3)), and they generally include the territories, but the presence of these from-time-to-time definitions merely fortifies the conclusion that in their absence, the term "State" means only that, and does not include the territories.

Finally, section 7 of Title 18 defines the phrase "special maritime and territorial jurisdiction of the United States" to include, among other things,

Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

There are no areas within any of the territories where the United States now asserts exclusive jurisdiction, and none with respect to which a territorial legislature has consented to acquisition by the United States or otherwise ceded jurisdiction to the United States. Indeed, the notion of a "cession" by a territory, which lacks the sovereignty attributed to a State, is logically impossible. (See the discussion on this subject in Memorandum No. 40-2(a).) Hence, the reference to a "State" in the above provision means only a State, and not a territory. But the territories of the Virgin Islands, Guam, and Samoa have been explicitly granted concurrent jurisdiction over Federal property within their borders by a 1986 law (Pub. L. 99-396) which confirmed a 1963 grant of concurrent jurisdiction (Pub. L. 88-183) (48 U.S.C. 1704(a)).

That 1986 law permits the President to exclude from the concurrent jurisdiction of the Government of Guam

persons found, acts performed, and offenses committed on the property of the United States which is under the control of the Secretary of Defense to such extent and in such circumstances as he finds required in the interest of the national defense. (48 U.S.C. 1704(b))

The President has taken no action under that provision, but its language would permit, in effect, exclusive Federal jurisdiction over property of the Defense Department in Guam.

The territories' concurrent jurisdiction statute (i.e., 48 U.S.C. 1704(a)) does not apply to the Northern Marianas. Neither the original 1963 law, nor its 1986 restatement, applies to the States, so section 502(a)(2) of the Northern Marianas Covenant--which deals only with laws that apply to both Guam and the States--cannot serve to extend it to the Northern Marianas. It might be argued that section 105 of the Covenant--which extends laws to the Northern Marianas without express mention of them if the law could also be made applicable to the States--could operate to make 48 U.S.C. 1704(a) applicable there. But that proposition is at least arguable and express extension would be preferable. The matter is discussed further, and a recommendation made, in Memorandum No. 48-4.

American Samoa. The anomaly presented as to American Samoa cannot go unmentioned. While the laws in Part I of Title 18 apply in most instances to it--thereby making certain conduct in American Samoa a Federal crime--there is no court with jurisdiction over Federal crimes generally in Samoa and no enforcement apparatus. That is, there is no court in Samoa with the general jurisdiction of a U.S. district court, and no U.S. Attorney for American Samoa, or elsewhere with jurisdiction in Samoa. (An American Samoan in, say, Hawaii could be prosecuted in the Federal District Court there, so

the immediate problem is confined to Samoans in Samoa. A prosecution in Hawaii, however, of a Samoan for a crime committed in Samoa, might be permissible under 18 U.S.C. 3238, if Hawaii were the place to which he is "first brought."^{1/})

^{1/} Whether 18 U.S.C. 3238 could serve this purpose is the subject of conflicting views. In an opinion dated December 11, 1987, the Interior Department's Acting Associate Solicitor, Division of General Law, concluded that the section could serve to permit trial in the District Court of Guam of a person arrested in Palau for violation of a Federal criminal law applicable to Palau. He reasoned that Palau, while it remains a trust territory, is within the "United States" for purposes of 18 U.S.C. 5; that an arrest warrant enforceable in Palau could be obtained from any U.S. District Court (Fed. R. Crim. Pro., Rule 4(d)(2)); that following arrest, the accused should be brought "without unnecessary delay," pursuant to Rule 5(a), before a Federal magistrate--almost certainly, for practical reasons, a Federal magistrate in Guam; that a judge or other local officer in Palau would probably not qualify for this purpose under 18 U.S.C. 3041 because of that section's reference to "state"; and that the District Court of Guam would have jurisdiction to try the alleged offender, if indeed it was the district "in which the offender . . . is first brought" under 18 U.S.C. 3238. By analogy, and taking geography into account, a person arrested in Samoa for a Federal crime would almost certainly be "first brought" to Hawaii, and thus the U.S. District Court in Hawaii would have jurisdiction to try the alleged offender.

On the other hand, the Criminal Division of the Justice Department in early 1987 expressed a contrary view. As summarized in a letter of December 23, 1987, from the Office of Legal Counsel of the Justice Department to the Interior Department, that view is as follows:

First, title 18 United States Code extends to American Samoa (18 U.S.C. 5), but American Samoa is not within the jurisdiction of any district court. Second, 18 U.S.C. 3238, which relates to the venue for offenses committed outside the jurisdiction of a State or district is of limited utility, because it may require indictment, and
(continued...)

The absence of Federal judicial machinery touching Samoa is discussed in Memorandum 28-1 and will not be repeated here. The elimination of the anomaly presented as to Title 18 requires legislative action that is beyond the scope of recommendations in this study--and that legislative action would require a major adjustment in Federal relations with Samoa that does not appear now to be widely welcomed there.

* * * * *

1/ (...continued)

possibly trial, in the District of Columbia. Third, 18 U.S.C. 3041, which relates to the issuance of arrest warrants and the removal of prisoners to federal courts that have cognizance over the offense, by federal judges, or magistrates, or by certain state officials does not apply to judges or officers on American Samoa. The Criminal Division therefore recommended [the enactment of new legislation so] that the venue for federal crimes committed on American Samoa be laid in the U.S. District Court for the District of Hawaii, and that the United States Attorney for the District of Hawaii be clearly authorized to prosecute such offenses. In addition, the judges on American Samoa appointed by the Secretary of the Interior should be authorized to issue arrest and search warrants and to order the transfer or removal of prisoners to the District of Hawaii. This could be done by an amendment of 18 U.S.C. 3041 or by a special provision applicable to American Samoa that would be codified in Title 48.

As to the second point in the Criminal Division's position, inasmuch as 18 U.S.C. 3238 does not state that indictment and trial are limited to the District of Columbia, and inasmuch as the Supreme Court countenanced a trial in parallel circumstances in Maryland (Jones v. United States, 137 U.S. 202 (1890)), the Interior position seems the more compelling. But unquestionably the matter ought to be resolved by further legislation, perhaps along the lines summarized in the Justice letter.

Turning, then, to sections of Part I of interest to the territories:

-- 18 U.S.C. 42(a) prohibits the

importation into the United States, any territory of the United States . . . or any possession of the United States . . . of the species of so-called "flying foxes" or fruit bats of the genus Pteropus

on the ground that they are "injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife . . .". The Northern Marianas Commission recommended that the Northern Marianas be given an exemption from this prohibition, on the ground that fruit bats are a gourmet delicacy there and their importation would have no adverse effect upon the environment because "few if any will escape the cooking pot" (Report, pp. 125-126). Informal reports of Northern Marianas' attitudes suggest that this point of view has recently changed, and that there is now no substantial sentiment for an exemption. For that reason, no change in the law is recommended here--but it should be noted that many residents of Guam share the Northern Marianas view that fruit bats are good to eat, so if an exemption were to be provided for the Northern Marianas, the same should probably be provided for Guam.

-- 18 U.S.C. 232^{2/} provides definitions for the laws concerning civil disorders (18 U.S.C. 231-233). Those laws make it a crime to teach or demonstrate the use of firearms or explosives, knowing that they will be used in a civil disorder; to transport such devices in "commerce", knowing that they will be used for that purpose; or to interfere with law enforcement officers during a civil disorder. The

^{2/} Corrected by Public Law 101-647.

definitions are inconsistent, providing that "commerce" includes only the States (not further defined) and the District of Columbia, but also providing that law enforcement officers can include the National Guard or militia of a "territory" (18 U.S.C. 232(7)). There is no apparent reason why these laws, like most of the rest in Title 18, should not apply fully to the territories--a result that could be achieved by defining "State" to include them. (The Northern Marianas Commission did not speak to this point.)

-- 18 U.S.C. 241-245, pertaining to the protection of civil rights, present two problems: first, provisions of geographic application that differ among the sections, and second, references to "citizens" that would exclude noncitizen nationals of American Samoa. More particularly,

18 U.S.C. 241, prohibits a conspiracy to deprive a "citizen" of a right secured by the Constitution or Federal law, without stating the section's geographical application;

18 U.S.C. 242, prohibits the deprivation of rights of "any inhabitant of any State, Territory, or District" under color of law;

18 U.S.C. 243, prohibits the disqualification of any "citizen" for jury service on account of race or color, in any U.S. or "State" court;

18 U.S.C. 244, prohibits discrimination against uniformed personnel "in any Territory, or Possession of the United States"; and

18 U.S.C. 245, added in 1968,^{3/} prohibits discrimination in a substantial number of "Federally protected activities," including voting, employment by a

^{3/} Corrected by Public Law 101-647.

Federal agency, attending a public school, traveling in interstate commerce, and many others. Internal references suggesting geographic application are inconsistent, with subsection (a)(1) referring to "any possession", and subsections (b) and (c) referring only to the "States", and sometimes to the District of Columbia. Additionally, the term "citizen" appears in subsection (b)(5).

The foregoing sections should be repaired, so as to make clear the full application of all of the sections to all of the territories, and to both citizens and nationals of the United States.

This matter is of some importance, as evidenced by the inclusion in section 5(c) of Presidential Proclamation 5207 of June 7, 1984, of references to 18 U.S.C. 241, 243, and 245. That Proclamation had the effect of permitting citizens of the Northern Marianas to be treated as citizens of the United States during the period preceding Trusteeship termination and the simultaneous collective naturalization of the citizens of the Northern Marianas. (Those events occurred in November 1986, so Proclamation 5207 now serves no purpose, but its inclusion of the civil rights sections now under discussion makes clear that importance is attached to them.) The term "citizen", thus, as it is used in sections 241, 243, and 245, should be defined to include a "national" of the United States--thereby extending the protections of the sections to noncitizen nationals, who are now almost exclusively American Samoans.

Additionally, the disparate phrases that denote geographic application--in sections 242, 243, and 245, as shown by the above quotations--should be made uniform, and this could be accomplished by defining "State" for purposes of those sections to include the territories. (The Northern Marianas Commission made that recommendation as to 18 U.S.C. 245(c) (Report, pp. 135-138), but, without explanation, it did not refer to any other sections of this chapter of Title 18.)

Section 244, which prohibits discrimination against uniformed personnel "because of that uniform" applies only in "the District of Columbia, or in any Territory, or Possession of the United States". Because it does not apply also to the States, section 502(a)(2) of the Covenant does not serve to extend it to the Northern Marianas. In commenting on this memorandum, however, the Department of Justice has recommended that 18 U.S.C. 244 be made applicable to the Northern Marianas. Justice states:

In our view, this section can and should be made applicable to the Northern Marianas Islands. It is true that section 502(a)(2) of the Covenant did not automatically extend that section to the Commonwealth. Congress, however, has the legislative power under section 105, to extend section 244 to the Northern Marianas Islands either on the ground that the section can be made applicable to the States under the Raise and Support Armies and a Navy Clause, and the Necessary and Proper Clause of the Constitution (Art. I, sec. 8, cls. 12, 13, and 18) or by specifically referring to the Northern Marianas Islands. (Ltr. of December 23, 1987.)

-- 18 U.S.C. 402^{4/} deals with contempt of an order of a Federal district court, if the action is "of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed." The term "State" is undefined for purposes of this section, and it ought to include the territories. The Northern Marianas Commission so recommended (Report, p. 136).

-- 18 U.S.C. 496 makes criminal the forgery or counterfeiting of documents relating to the entry of imports

^{4/} Corrected by Public Law 101-647.

or the collection of duties. It is one of several laws in Title 18 pertaining to customs that the Northern Marianas Commission recommended be made inapplicable to the Northern Marianas--on the ground that the Northern Marianas is outside the U.S. customs area and "offenses against its customs laws should be defined and punished pursuant to the laws of the Northern Marianas Islands, not pursuant to federal law" (Report, p. 128). (The other sections for which the Commission made the same recommendation are 18 U.S.C. 541-552, 1364, and 1915, mentioned at the appropriate points below.)

The difficulties presented by that recommendation are several. All of the territories are outside the U.S. customs area, so that the Northern Marianas' situation is not unique. (But in one, the Virgin Islands, territorial duties are collected by Federal officers (48 U.S.C. 1395).) None of the territories has local laws on all of the subjects with which these provisions of Title 18 deal--so a declaration of inapplicability would leave a gap--and that gap could invite misbehavior. There are other sections of Title 18 that also deal with imports and customs. (Some are cited in the Northern Marianas Report (page 128). And there are yet others, such as 18 U.S.C. 1462, which deals with the importation of obscene material, and which the Northern Marianas Commission does not mention). While it would be possible to cite all such sections as being inapplicable to all of the territories, that would create more gaps, and more invitations to misbehavior.

A better course would appear to be to do nothing to disturb the current application of the sections in question to the territories, i.e., sections 496, 541-552, 1364, and 1915 (but as mentioned below, some sections within 18 U.S.C. 541-552 are already inapplicable to some of the territories), and instead to permit the territories also to enact legislation on the same subjects, so long as it is consistent with Federal law. Title 18 contains many such statements of Federal non-preemption of the field (e.g., 18 U.S.C. 233). This would afford the territories as much freedom of legislative action as they could reasonably want, while avoiding the creation of disturbing gaps in the law.

-- 18 U.S.C. 505 makes criminal the forgery of the signature of any judge or other officer of "any court of the United States, or any Territory thereof." The term "Territory" derives from a 1909 law, when the term was usually understood to mean an incorporated territory; and given the strict construction accorded to criminal statutes, it might thus be construed today to exclude the territories. But, given the legislative authority that each territory has, each can enact its own laws on this subject. Particular Federal "protection", which is probably the motive for the section, is no longer required. So no change appears to be necessary.

-- 18 U.S.C. 541-553 constitute the chapter titled "Customs", and set forth a dozen kinds of crimes pertaining to the entry of goods. They, thus, constitute the kinds of subjects upon which the territorial legislatures could also appropriately act, as described under 18 U.S.C. 496, above.

Three of these sections, however, are already inapplicable to most of the territories: 542, pertaining to false statements in a customs declaration; 544, pertaining to the relanding of goods without payment of duties; and 545, pertaining to smuggling. These three sections each contain an express exemption from their terms for the Virgin Islands, Guam, and Samoa, among others. But that exemption would not apply, without further amendment, to the Northern Marianas (because it is otherwise within the United States for purposes of Title 18, and the Covenant does not operate to extend Guam's exemptions to the Northern Marianas). Accordingly, the Northern Marianas should be added to the exemption list for these three sections.

-- 18 U.S.C. 659, 660. and 666^{5/} all deal with embezzlement or theft: section 659 with the theft of interstate shipments of goods, section 660 with the theft of assets of an interstate carrier by an officer or employee, and section 666 with theft or bribery related to Federal programs. The chapter of which these sections are a part applies generally to the territories (excepting 18 U.S.C. 666, which

^{5/} Section 666(d) was amended by Public Law 101-647.

applies only to "State" agents), but the use of the term "States", undefined, in these three sections raises questions. In sections 659 and 660, it is only "State" court judgments that bar a Federal prosecution, and the term should be defined to include the territories. (The Northern Marianas Commission recommended the amendment of section 659, but did not speak to section 660. (Report, p. 136.)) The term "State" as used in section 666 should also be defined to include all of the territories.

-- 18 U.S.C. 793(h)(1) and 794(d)(1) are among the laws pertaining to espionage and censorship, and although the laws apply to the territories because they are within the United States, these two sections contain a reference to "State law" (concerning the forfeiture of property). The term "State" should in each case be defined to include the territories.

-- 18 U.S.C. 841(b), pertaining to the importation or the distribution in interstate commerce of explosive materials, does not require amendment, but it presents an interesting problem of construction. "Interstate commerce" is defined to include commerce between a State and any place outside that State, or commerce "within any possession of the United States . . . or the District of Columbia." "State" includes the possessions. Accordingly, the prohibitions apply to commerce with or within the Virgin Islands, Guam, and Samoa, but as to the Northern Marianas, they apply to commerce with the Northern Marianas but not within it--because that would involve a special exercise of Federal power. Such an exercise of Federal power does not result from section 502(a)(2) of the Covenant (which provides that laws applicable to Guam apply to the Northern Marianas "as they are applicable to the several States"), nor from section 105 (by which laws are not applicable to the Northern Marianas unless they can be made applicable to the States, or unless the Northern Marianas is expressly named in the law--and it is not named in 18 U.S.C. 841(b)). The Congress could, of course, amend 18 U.S.C. 841(b) to extend it to intraterritorial commerce in the Northern Marianas by expressly naming the Northern Marianas, but there is no known need for it to do so.

-- 18 U.S.C. 921-928 restrict the importation and transportation in interstate commerce of firearms, and require Federal licenses of importers, dealers, and manufacturers. General definitions make clear that the territories are covered (18 U.S.C. 921(a)(2)), but two other provisions are unusual. Apparently to fortify the application of the chapter to the territories, 18 U.S.C. 922(a)(2)(C) provides that the restrictions of that paragraph apply to each possession no differently than if "the possession were in fact a State of the United States." The provision appears to be redundant, but is otherwise unobjectionable. But at 18 U.S.C. 925(a)(5) the territories are excluded from the "United States" for purposes of two exceptions from the Federal regulatory scheme: licensed dealers may ship firearms for sporting purposes to a member of the Armed Forces "outside the United States" (18 U.S.C. 925(a)(3))--thus permitting such shipments to service personnel in the territories, but not in the States; and shipment of firearms may be permitted, for sporting purposes or as souvenirs, to the place of residence in "the United States" of service personnel (18 U.S.C. 925(a)(4))--apparently foreclosing such shipments to service personnel with residences in the territories. The treatment is obviously disparate, but appears to be of insufficient moment to warrant repair.

-- 18 U.S.C. 953 contains what is popularly called the Logan Act, which prohibits a "citizen of the United States" from dealing with a foreign government in an effort to influence that government in relation to any dispute with the United States. (The Compact of Free Association in section 153(b) permits a U.S. citizen or national to represent a Freely Associated State to a foreign government, without violating this law.) Inasmuch as the law applies only to a "citizen", a noncitizen national would not be covered by it--but it seems proper to conclude that this defect is de minimis and need not be corrected.

-- 18 U.S.C. 958 and 963 are sections that also refer to "citizens", but neither seems of sufficient importance to warrant amendment to include nationals. (These sections are mentioned here as illustrative of the kinds of laws, applicable only to "citizens", that appear from time to time in Title 18 but that are not the subject of recommended change

in this study, because they appear to relate to matters not likely to have any realistic application to Samoans, whether they are in Samoa or elsewhere in the United States. Those laws that could be of importance to them, such as the civil rights laws at 18 U.S.C. 241-245, discussed above, are the subject of positive recommendations in this memorandum.) Section 958 concerns citizens who accept a commission to serve a foreign government at war against a government friendly to the United States; section 963 concerns vessels for "warlike use" owned by citizens, during a war in which the U.S. is neutral.

Note: As to the foregoing discussions of 18 U.S.C. 953, 958, and 963, the Justice Department has commented as follows:

These sections deal with matters that have a potential impact on the national security, given the strategic location of the islands in which there are, or may be, noncitizen nationals of the United States. For that reason and in the interest of uniformity, we suggest that further consideration be given to the applicability of those sections to all persons "in the United States" or "owing allegiance to the United States."

The suggestion, although unquestionably worthy, is not adopted as a recommendation here because it would have an effect well beyond the territories--with the first quoted phrase embracing aliens. It is, thus, beyond the intended scope of this study.

-- 18 U.S.C. 969^{6/} prohibits the export of arms, intoxicating liquor, or opium to "any aboriginal native of any of the Pacific Islands" lying within a described area of the Pacific "not being within the protection of any civilized power." The area described in the law, by latitude and longitude, includes Guam, Samoa, part of the Northern

^{6/} Section 969 was repealed by Public Law 101-647.

Marianas, all of the rest of the former Trust Territory, and part of Hawaii--among other areas. It should be repealed, having outlived whatever usefulness it might ever have had, and being now patently offensive. The Northern Marianas Commission so recommended (Report, p. 130), noting that its passage in 1902 was supported by missionary societies, so as to avoid sales "for the purpose of so infuriating these tribes that they may kill the civilized portion of the people that are on those islands" (35 Cong. Rec. 1202).

-- 18 U.S.C. 1020 makes criminal any false statement by an employee of the United States "or of any State or Territory" in relation to certain Federally-associated highway projects. Because "State" is undefined, and because "Territory" might be construed to exclude unincorporated territories--the section being derived from a 1922 law, at which time the term may have been intended to cover Alaska and Hawaii only--it would be well to clarify the application of the law to the territories, by defining them for this purpose as "States".

-- 18 U.S.C. 1073 prohibits flight to avoid prosecution or giving testimony. Because it applies to persons moving in interstate commerce, it applies to the territories in light of 18 U.S.C. 10--and for that reason a reference to territories and possessions that appeared in the original 1934 law was omitted in the 1948 revision of the criminal laws (see the Reviser's Note following the section). However, the section's prohibition of flight in connection with "State" investigatory proceedings might not apply to the territories, so a definition of that term to include them--or in the alternative, the substitution of the word "place" for "State"--would be desirable.

-- 18 U.S.C. 1084 prohibits, with certain exceptions, the use of the telephone to transmit gambling information in interstate commerce. Although subsection (c) refers to the territories in its statement, that the section does not confer immunity from prosecution under the laws of a State, territory, or possession, subsections (b) and (d) refer to a "State", undefined. To insure that the territories are

accorded the same treatment as the States under the section, the term "State" should be defined to include them.

-- 18 U.S.C. 1114^{2/} makes it a Federal crime to kill or attempt to kill particular Federal officers or employees, listed at length in the section. Among them are Agriculture Department employees

designated . . . to carry out any law or regulation or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands . . . for the control . . . of animal diseases. . . .

The Northern Marianas Commission recommended that "the Northern Marianas Islands" be added (Report, pp. 137-138)--probably on the theory, unstated, that section 502(a)(2) of the Covenant would not extend it there, because the provision in question does not also apply to the States--or possibly because the Northern Marianas would require express mention under section 105. Although the need for such an amendment seems marginal and arguable, it could not be hurtful and it might at the same time be expanded to include Samoa as well.

-- 18 U.S.C. 1301-1307 contain the Federal lottery laws. Section 1301 makes criminal the importation or transportation in interstate commerce of lottery tickets or other lottery information; section 1302 bars the use of the mails for the distribution of lottery material; section 1303 prohibits Postal Service employees from knowingly handling lottery material; and section 1304 prohibits Federally-licensed radio stations from broadcasting lottery information. All of these sections now apply to the territories. (The remaining sections of the chapter on lotteries present no problem to the territories, with the exemption provided at 18 U.S.C. 1307 for State lotteries extending to territorial lotteries as well.)

^{2/} Corrected by Public Law 101-647.

Because lotteries and other games of chance are much employed in the Northern Marianas by nonprofit organizations for religious, charitable, educational, or benevolent purposes, the Northern Marianas Commission recommended legislation to exempt the Northern Marianas from the application of these sections, as well as from the companion section of the postal laws (39 U.S.C. 3005) (Report, pp. 131-135). As stated in Memorandum No. 39-1(a) of this study, if that exemption were provided, it ought also to be provided for Guam, where lotteries are similarly in use by nonprofit organizations. But the Justice Department has expressed opposition to the proposal (in a letter to Interior dated December 23, 1987), stating

We do not concur in the recommendation that the Northern Marianas Islands and Guam should be excepted from the application of Chapter 61 (lotteries) of Title 18 on the ground that the local lotteries are much employed in those islands by nonprofit organizations for religious, charitable, educational or benevolent purposes. The same arguments apply to lotteries conducted in the several States and in the other territories; hence, there appears to be no ground to exempt Guam and the Northern Marianas Islands from those prohibitions. Moreover, [Chapter] 61 does not appear to be overly burdensome in the small island communities such as Guam and the Northern Marianas Islands where there is little occasion to use the mails in connection with the conduct of lotteries.

The Justice Department position appears to be well-taken, and therefore the Northern Marianas' Commission recommendation is not adopted here.

-- 18 U.S.C. 1364 makes criminal an action that interferes with the export from the United States, by fire or explosives, of articles in foreign commerce. This is a section that the Northern Marianas Commission recommends be made inapplicable to the Northern Marianas on the ground that the Government of the Northern Marianas administers its own customs laws (Report, pp. 126-129). As stated above, in connection with 18 U.S.C. 496, that rationale does not appear to be persuasive, and it would be preferable to deal with the issue as it pertains to all territories by means of the non-Federal-preemption language there proposed.

-- 18 U.S.C. 1715 and 1716(e) and (g), which deal with nonmailable items (firearms, poisons, and switchblade knives) contain references that may exclude the territories: "State, Territory, or District" in sections 1715 and 1716(g), and "State, or local government" in section 1716(e). The protections that these sections afford should be available in the territories as well, and that could be achieved by defining "State" to include them.

-- 18 U.S.C. 1761 makes criminal the importation or transportation in interstate commerce of prison-made goods, and applies to the territories; but the section also contains exemptions that may not--because they refer to "States" without defining the term. Consistency suggests that the term should be defined for purpose of the section to include the territories.

-- 18 U.S.C. 1821 is concerned with false teeth, and with their transportation or mailing, to a jurisdiction that bars their construction by unlicensed persons. The geographic references within the small section are numerous but in conflict. On the (unsupported) supposition that false teeth created by unauthorized incompetents do not constitute a problem of consequence in any of the territories, the section will not be the dealt with further.

-- 18 U.S.C. 1901 and 1911 are among the laws that make criminal particular conduct by particular Federal employees. Section 1901 pertains to Federal collection or

disbursing officers who carry on "any trade or business in the funds or debts of the United States, or of any State"; and section 1911 pertains to receivers and trustees in a court of the United States who mismanage property "according to the requirements of the valid laws of the State" where such property is located. In each case the term "State" should be defined to include the territories.

-- 18 U.S.C. 1915 prohibits a U.S. customs officer from compromising a customs claim without lawful authority. This too is a section that the Northern Marianas Commission recommended be made inapplicable to the Northern Marianas, on the ground that the Government of the Northern Marianas administers its own customs laws (Report, pp. 126-129). As stated above in connection with 18 U.S.C. 496, that rationale does not appear to be persuasive, and it would be preferable to deal with the issue as it pertains to all territories by means of the nonfederal-preemption language there proposed.

-- 18 U.S.C. 1951-1957^{8/} contains the racketeering laws. Because they apply for the most part to activities in "commerce", they apply in general to the territories--in light of the definition at 18 U.S.C. 10--and the predecessor of 18 U.S.C. 1952 has been held to be applicable to Guam (U.S. v. Taitano, 442 F.2d 467 (1971), cert. den. 404 U.S. 852). Section 1951 carries its own definition of "commerce", which comprehends the territories. But several sections refer as well to laws of a "State"--a term defined within two sections to include the territories for purposes of those sections (18 U.S.C. 1953(d), 1955(b)(3)), but the term appears also in other sections where it is not defined, i.e., 18 U.S.C. 1952(b), 1952A(a), 1952B(a), and 1956(a) and (c). Because Puerto Rico has been held to be a "State" for purposes of one of those sections, i.e., 18 U.S.C. 1952(b) (U.S. v. Steele 685 F.2d 793, at 804-805 (1982), cert. den. 459 U.S. 908), a clarification may not be essential. But to avoid uncertainty and argument it would be well to define "State" to include the territories for purpose of those sections where such a definition is now lacking.

^{8/} Sections 1952(b) and 1956(c) were amended by Public Law 101-647.

-- 18 U.S.C. 1991 is illustrative of a law that, although of ambiguous application to the territories, does not require clarification. The law applies to "any Territory or District", but it concerns railroads, of which the territories currently, and probably for the indefinite future, have none.

-- 18 U.S.C. 2113 makes criminal the robbery of a "credit union", defined as a Federal credit union or a State-chartered credit union insured by the Administrator of the National Credit Union Administration. Because that Administration now has authority with respect to the territories (see Memorandum No. 12-7(a)), "State" chartered credit unions should be defined to include those chartered in the territories.

-- 18 U.S.C. 2117 makes criminal the robbery or burglary of the facilities of an interstate carrier. The law applies to the territories, because of the definition of "commerce" at 18 U.S.C. 10, but references to a "State" in relation to a bar to prosecution, and to Federal preemption, should be expanded to include the territories.

-- 18 U.S.C. 2279 prohibits any person, other than one "in the United States service", from boarding a vessel before its arrival in port. The Northern Marianas Commission recommended the amendment of the section, so as to permit harbor pilots, territorial customs officials, and territorial law enforcement officers in the performance of their duties, to board vessels as necessary, prior to the vessel's arrival in the Northern Marianas (Report, p. 128-129). The recommendation has merit for all of the territories, and ought to be expanded to include them all.

-- 18 U.S.C. 2313^{9/} makes criminal the receipt, sale, or other disposition of a stolen motor vehicle or aircraft "which has crossed a State or United States boundary." Before

^{9/} Corrected by Public Law 101-647.

its amendment in 1984 (by section 203 of Public Law 98-547), the section referred instead to a motor vehicle or aircraft moving in "interstate or foreign commerce." The readily available legislative history of the 1984 change does not explain its rationale (1984 U.S. Code Cong. and Admin. News 4628-4654), but the effect of the change appears to be to create some doubt as to the application of the section to the territories. That doubt could be eliminated by a definition of "State" to include the territories.

-- 18 U.S.C. 2315^{10/} presents the same problem. That section makes criminal the receipt, sale, or other disposition of stolen goods, securities, or money or of certain forged or counterfeit papers "which have crossed a State or United States boundary." Again, before the amendment of the section in 1986 (by section 76 of Public Law 99-646) the reference was to "interstate or foreign commerce," and again the readily available legislative history is silent as to the reason for the change in language (1986 U.S. Code Cong. Admin. News 6138-6157). As in the case of 18 U.S.C. 2313, the result is to make unclear that which was earlier unambiguous, and clarity could be restored by the definition of "State" to include the territories.

-- 18 U.S.C. 2341-2346 contains the laws headed "Trafficking in Contraband Cigarettes," enacted in 1978 to attack the problem of "organized crime and other large scale operations of interstate cigarette bootlegging" (1978 U.S. Code Cong. and Admin. News 5518). Because of the disparity of tobacco taxes among the States, it had become attractive for organized crime to transport cigarettes from a low-tax State to a high-tax State, selling them in the latter at great profit. Section 2342 makes it criminal to deal in contraband cigarettes, i.e., those that bear no evidence that the tax of the State where the cigarettes are found has been paid; and section 2343 requires recordkeeping by dealers and permits inspection by the Secretary of the Treasury.

^{10/} Corrected by Public Law 101-647.

The law applies to Puerto Rico and the Virgin Islands in the same manner as to the States (18 U.S.C. 2341(4)), but it does not apply to the Pacific territories. The Senate passed legislation that would have included all of the territories; the House version included Puerto Rico and the Virgin Islands only; and the Conference Committee adopted the House language "as more accurately delineating the practical scope of this legislation" (1978 U.S. Code Cong. and Admin. News 5539). No further explanation appears. The decision may have reflected the absence of Treasury Customs personnel in the Northern Marianas, Guam, and Samoa, but that does not seem a sufficient basis for excluding them. Such an absence need not be permanent; Treasury authority could be delegated to others in those territories, if there were a need; and in both Guam and the Northern Marianas Federal law enforcement personnel are present. All three impose territorial taxes on cigarettes. The definition at 18 U.S.C. 2341(4) should, thus, be amended to restore the original Senate language.

-- 18 U.S.C. 2421-2423 makes criminal the transportation in interstate or foreign commerce, "or in any Territory or Possession of the United States", of persons for purposes of prostitution or other illegal sexual activity. The sections are unusual because they not only apply to intraterritorial activity, but because predecessor sections have been held to do so within both Puerto Rico (Jarabo v. U.S., 158 F.2d 509 (1946)), and the Territory of Hawaii (Sun Chong Lee v. U.S., 125 F.2d 95 (1942)). The sections would thus apply to activities wholly within the Virgin Islands, Guam, and Samoa as well--but not to activities wholly within the Northern Marianas, because neither section 502(a)(2) nor section 105 of the Covenant operates to extend to the Northern Marianas Federal laws that do not apply or cannot also be made applicable to the States (unless the Northern Marianas are, under section 105, specifically named). These laws do not and could not control intra-State activities. Hence, only commerce between the Northern Marianas and a place outside of it are now covered by these sections.

Conclusion: In light of the foregoing discussion, the following laws in Part I of Title 18 should be amended in order to provide fully for the territories^{11/}:

(1) The term "State" should be defined to include the Virgin Islands, Guam, American Samoa, and the Northern Marianas for the purpose of sections

- 232 - concerning civil disorders,
- 242, 243, and 245 - providing protections for civil rights,
- 402 - concerning contempt of Federal court orders,
- 659, 660, 666 - concerning embezzlement and theft,
- 793(h)(1) and 794(d)(1) - concerning espionage and censorship,
- 1020 - concerning certain highway projects,
- 1073 - prohibiting flight to avoid prosecution or testimony,
- 1084 - concerning gambling information,
- 1715 and 1716(e) and (g) - concerning nonmailable items,
- 1761 - concerning prison made goods,
- 1901 and 1911 - concerning conduct by certain Federal officers,
- 1952(b), 1952A(a), 1952B(a), and 1956(a) and (c) - concerning racketeering,

^{11/} Note that, as indicated in earlier footnotes in this memorandum, some of the amendments contained in this statement of Conclusion have already been achieved.

2113 - concerning robbery of a credit union,

2117 - concerning robbery of an interstate carrier,

2313 - concerning stolen vehicles, and

2315 - concerning stolen property or forged papers.

(2) The term "citizen" should be defined to include a national of the United States for purposes of sections 241, 243, and 245 providing protections for civil rights.

(3) As recommended by the Department of Justice, section 244, which prohibits discrimination against uniformed personnel, should be made expressly applicable to the Northern Marianas.

(4) A section should be added, perhaps as a new section 554 at the end of Chapter 27 on Customs, stating that with respect to the enactment and enforcement of customs laws, the Congress has not "occupied the field", thereby permitting territorial legislatures to enact compatible territorial laws for that purpose. Such a statement of nonfederal-preemption should apply at least to the laws at 18 U.S.C. 496, 541-553, 1364, and 1915 (on all of which the Northern Marianas Commission offered recommendations).

(5) The exemptions expressly accorded to the Virgin Islands, Guam, and Samoa under certain of the customs laws, i.e., 18 U.S.C. 542, 544, and 545, should be extended to the Northern Marianas.

(6) The law restricting exports to certain Pacific Islands, 18 U.S.C. 969, should be repealed.

(7) The law concerning the murder of certain Agriculture Department employees, at 18 U.S.C. 1114, should be extended to the Northern Marianas and Samoa.

(8) Officers of the Governments of the Virgin Islands, Guam, Samoa, and the Northern Marianas should be permitted to board vessels about to arrive in their ports, notwithstanding 18 U.S.C. 2279.

(9) The Contraband Cigarette laws, which now apply to the Virgin Islands, at 18 U.S.C. 2341(4), should be extended also to Guam, Samoa, and the Northern Marianas.

Federal agency comments: Comments on this memorandum were requested from the Department of Justice. All comments received are reflected at appropriate points above. The Justice Department's suggestion as to sections 953, 958, and 963 (discussed above in the "Note" following those sections) does not take the form of a recommendation here, because its effect would exceed the scope of recommendations made in this study.

Subject: Title 18 of the United States Code
Crimes and Criminal Procedure

- (a) Part II. Criminal Procedure (18 U.S.C. 3001-3772)
- (b) Part III. Prisons and Prisoners (18 U.S.C. 4001-4353)
- (c) Part IV. Correction of Youthful Offenders (18 U.S.C. 5001-5042)
- (d) Part V. Immunity of Witnesses (18 U.S.C. 6001-6005)

Appendix:

Interstate Agreement on Detainers Act
Classified Information Procedures Act

Comment: The rules of Criminal Procedure, dealt with in Part II of Title 18, apply to the District Courts of the territories; but certain sections of Parts III and IV (on the subject of Prisons and Prisoners, and the Correction of Youthful Offenders) contain language making their application uncertain, and that uncertainty should be removed. The remaining portions of Title 18 (Immunity of Witnesses, and the laws contained in the Appendix) present no problems for the territories.

Discussion: (a) Part II of Title 18, entitled Criminal Procedure (18 U.S.C. 3001-3772), contains the procedural rules for the administration by Federal courts of Federal criminal laws. Its sections are sometimes derived from statutes and other times contain cross references to the Rules of Criminal Procedure, prescribed by the Supreme Court.

In light of Public Law 98-454 of 1984, sometimes referred to as the Territorial Courts Act, it is possible to state with confidence that "where appropriate," Part II and the Federal Rules of Criminal Procedure apply to the District Courts of the Virgin Islands, Guam, and the Northern Marianas. The 1984 law so provides expressly as to the Virgin Islands (48 U.S.C. 1614(b)), Guam (48 U.S.C. 1424-4), and the Northern Marianas (48 U.S.C. 1694(c))--with special provisions as to each (which help define what is "appropriate") in each of those sections.

Part II and the Federal Rules do not apply generally to Samoa, which has no Federal District Court, but some provisions may do so in light of internal references to "territories" or "possessions."

In the absence of Public Law 98-454, some questions would necessarily arise concerning application of these laws to the District Courts of the territories, because of the disparate language used in Part II concerning geographic application. The disparities are the almost inevitable result of piecemeal legislating over two centuries. While the broad definition of "United States" at 18 U.S.C. 5 applies to the entire Title, Part II makes occasional reference to "States," undefined (e.g., 18 U.S.C. 3148(b), 3150), and to "Territories," also undefined (e.g., 18 U.S.C. 3182). And other peculiarities appear. Reference is made to an Article III court at 18 U.S.C. 3502, which without more would exclude the Article IV courts in the territories. And further, while some sections have been updated to refer to all three of the territorial District Courts (e.g., 18 U.S.C. 3006A(j)), yet others make express reference to the District Court of the Virgin Islands only (18 U.S.C. 3241, 3771, 3772). But none of the foregoing constitutes a current problem, for the 1964 legislation had the effect of extending them all, and others like them, to the three District Courts. And it could not reasonably be contended that the term "State," when used in Part II, does not also include those territories.

As noted, Part II is generally inapplicable to Samoa because it has no Federal District Court, but some provisions not dependent on such a court are applicable there. For example, rewards that are authorized by 18 U.S.C. 3071-3077 for information concerning terrorist acts could be paid to a qualifying person in Samoa (18 U.S.C. 3077(2), (4), (5)); court orders permitting the use of "a pen register or a trap and trace device" (which are sophisticated wire-tapping tools) are possible in Samoa (18 U.S.C. 3126(6)); the rule concerning the competency of the accused to testify (18 U.S.C. 3481) probably applies in Samoa; and the requirement that records of certain criminal convictions be supplied to the U.S. Attorney General (18 U.S.C. 3662) clearly applies to Samoa. More importantly, it may be that section 3238, which is contained in Part II of Title 18, may permit the trial in Hawaii of

persons arrested in Samoa for the commission of Federal crimes. (For a discussion in this matter, as well as on the probable inapplication to Samoa of 18 U.S.C. 3041, see the footnote in Memorandum No. 18-1 in the section headed "American Samoa.")

The extradition laws deserve particular comment. These laws (18 U.S.C. 3181-3195) concern both extradition between States (or a "Territory"), and from the United States to a "foreign country" with which the United States has an extradition treaty. The latter, which are the international extradition laws, apply in the territories in the same manner as they apply in the States, given their clear purpose and the broad definition of "United States" at 18 U.S.C. 5. So the reference to "State" at 18 U.S.C. 3184 (which permits "any judge of a court of record of general jurisdiction of any State" to issue a warrant for the apprehension of one charged with a crime within the jurisdiction of a foreign government under treaty with the U.S.) must be read to include Samoa, as well as the other territories. In addition, the pertinent laws concerning international extradition, *i.e.*, 18 U.S.C. 3184, 3186, and 3188-3195, are expressly applicable to the Freely Associated States under section 175 of the Compact, and agreements on extradition, which are comparable to treaties, are in effect between the United States and the Freely Associated States.

As to extradition among the States and territories, the matter is governed by 18 U.S.C. 3182, which permits "the governor or chief magistrate of the State or Territory" from which a fugitive has fled, to demand that he be delivered up by the "executive authority" of the jurisdiction to which he has fled. The use of "State or Territory" language is understandable, inasmuch as the law derives from the venerable Revised Statutes. But the words have been construed quite broadly enough to include all of the territories. In 1984, the Supreme Court of Hawaii held that the Federated States of Micronesia (which were then still a part of the Trust Territory, and not yet a Freely Associated State) constituted a "Territory of the United States" for purposes of 18 U.S.C. 3182 (Wolfe v. Au, 686 Pac.2d 16). In reaching this conclusion, the Hawaii court relied upon New York ex rel. Kopel v. Bingham (211 U.S. 468 (1909)), in which the Supreme

Court reached the same conclusion under the predecessor interstate extradition law with respect to the then unincorporated territory of Puerto Rico. The Supreme Court has recently reached the same conclusion again as to the application of 18 U.S.C. 3182 to the Commonwealth of Puerto Rico (Puerto Rico v. Branstad, ___ U.S. ___, 55 LW 4975, June 23, 1987). There should, thus, be no doubt but that 18 U.S.C. 3182 applies fully to the territories, either as seekers or deliverers up of fugitives.

(b) Part III, Prisons and Prisoners (18 U.S.C. 4001-4353), concerns the administration of the Federal prison system and the treatment of prisoners. As such, it is largely irrelevant for purposes of this study--except for the use once of the term "citizen," and the use from time to time of the term "State," undefined. When the term "State" is used, it usually appears in contexts of unlikely importance to the territories, but if the term were to be defined for purposes of the many sections of Part I of Title 18, as recommended in Memorandum No. 18-1, then some sections of Part III could also profit from such a definition.

In only one instance is the term defined for purposes of any part of Part III, and that is in connection with the transfer of offenders who are U.S. citizens or nationals and who are sentenced by a foreign country (18 U.S.C. 4100-4115). If a treaty so provides, they may be transferred to the United States, but certain limitations under "State" law are imposed (18 U.S.C. 4110, 4111, 4112), and that term is defined to include the territories (18 U.S.C. 4101(i)). Sections 4100-4115 of Title 18 are also expressly applicable to the Freely Associated States, under section 175 of the Compact and the agreement pursuant to it.

Otherwise, the term "State" is used, in one chapter in the company of "Territory" (18 U.S.C. 4002, 4003)), and it could be helpful to define the term to include the current territories. The sections of Part III of Title 18 in question are the following:

- 4002, 4003 - pertaining to Federal prisoners in State institutions;
- 4042(4) - pertaining to technical assistance from the Bureau of Prisons;
- 4241-4247 - constituting Chapter 313 on Offenders with Mental Disease or Defect, which contains references to a "State," for example at 4243(e), 4246(a), (d), and (g), and 4247(i);
- 4352 - authorizing the National Institute of Corrections to provide assistance to "States."

It is probable that some of the results provided in the foregoing laws could be achieved under existing law: the general technical assistance authority at 48 U.S.C. 1469d(a) might comprehend that under 18 U.S.C. 4042 and 4352; and as for other sections, in a pinch a decision-maker could construe "State" to mean a "territory," as has been known to happen. But to eliminate both argument and strain, an express definition to include the territories could be of value.

As for "citizen," the term appears at 18 U.S.C. 4001(a), which provides that

No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

The section was regarded as having sufficient importance to be included in section 5(c) of Presidential Proclamation 5207 of June 7, 1984, which had the effect of according U.S. citizenship status to citizens of the Northern Mariana Islands prior to their collective naturalization at the time of

trusteeship termination. (Reference is made to that Proclamation in Memorandum No. 18-1, where it is discussed in connection with 18 U.S.C. 241-245.) In the circumstances, the reference to "citizen" at 4001(a) should be expanded to include a national of the U.S.

(c) Most of Part IV, Correction of Youthful Offenders (18 U.S.C. 5001-5042) is of uncertain application to the territories.^{1/} Only one section in Part IV--18 U.S.C. 5003, pertaining to the transfer to Federal custody of persons convicted of State or territorial offenses--contains language making clear that the territories are encompassed by it. Otherwise sections of this Part IV use language that could exclude the territories, viz,

18 U.S.C. 5001 - pertaining to the transfer to "State" custody of a person under twenty-one charged with an offense punishable in "any court of the United States" who appears to have committed an offense under the laws of "any State"; and

18 U.S.C. 5031-5042 - (constituting Chapter 403 on the subject of Juvenile Delinquency) prescribing special procedures for the treatment of a "juvenile" (i.e., one not yet eighteen), including the transfer to a "State" from a "court of the United States" of delinquency proceedings in certain circumstances (18 U.S.C. 5032).

It would be well if terms were defined for the purposes of these sections so as to make clear their application to the territories and to the Federal District Courts in them. The term "State" should be defined to include all of the territories, and the terms "court of the United States" or "District Court" should be defined to include the Federal District Courts in the Virgin Islands, Guam, and the Northern Marianas. The latter result could probably be reached without an express definition, inasmuch as each has the jurisdiction by statute now of a District Court of the United States, but

^{1/} Corrected by Public Law 101-647.

the clarification could be of value, because the territorial District Courts are often expressly referred to elsewhere in Title 18.

(d) Part V, Immunity of Witnesses (18 U.S.C. 6001-6005), permits the granting of immunity to a witness who refuses to testify on the basis of the privilege against self-incrimination. It applies to a "court of the United States," expressly defined to include the District Courts of Guam and the Virgin Islands (18 U.S.C. 6001(4)). The District Court of the Northern Marianas would equally be covered, either because it has "the jurisdiction of a District Court of the United States" (48 U.S.C. 1694a(a)), or because the provisions of Part V, being applicable to both Guam and the States, are applicable to the Northern Marianas under section 502(a)(2) of the Covenant.

Appendix. The two statutes contained in the Appendix to Title 18 appear to present no difficulties for the territories:

The Interstate Agreement on Detainers Act, enacted in 1970, provides a procedure by which a person imprisoned in one jurisdiction may obtain the disposition of a detainer, *i.e.*, an untried indictment, information, or complaint, outstanding in another. The Act permits the United States to cooperate with jurisdictions that have passed complimentary laws, and such jurisdictions may include the territories and possessions (Article II(a) of section 2). As of 1984, apparently no territory had done so (see note following section 1).

The Classified Information Procedure Act, passed in 1980, prescribes the manner in which the United States may deal with information, classified in the interests of national security, that is proposed to be presented by a defendant at trial. The Act applies to Federal district courts, not further defined, but because it is in effect a kind of addendum to the Federal Rules, the territorial District Courts are covered by it.

Conclusion: The term "State" should be defined for purposes of certain sections of Parts III and IV of Title 18 (i.e., 18 U.S.C. 4002, 4003, 4042(4), 4241-4247, 4352, 5001, and 5031-5042); the term "citizen" should be defined to include "national" at 18 U.S.C. 4001(a); and the District Courts of the territories should be expressly included within 18 U.S.C. 5031-5042, pertaining to the treatment of juveniles.^{2/}

Federal agency comments: Comments were requested from the Department of Justice. All comments received are reflected above.

^{2/} Public Law 101-647 amended 18 U.S.C. 5032 in the manner described.

Title 19 - CUSTOMS DUTIES

- Contains nothing of substantial interest to the territories.
- * Contains matters of particular interest to the territories, but no legislative recommendations.
- (**) Contains recommendations for changes in the law, but the need for them is not urgent.

<u>Memorandum Number</u>	<u>Subject</u>	<u>19 U.S.C. sections</u>
19-1	(**) (a) Collection Districts, Ports, and Officers	1-70
	* (b) Foreign Trade Zones	81a-81u
	* (c) The Tariff and Related Provisions	126-580
19-2	(**) Tariff Act of 1930	1202-1677h
19-3	(**) (a) Smuggling	1701-1711
	* (b) Trade Fair Program	1751-1756
	* (c) Trade Expansion Program	1801-1982
	- (d) Automotive Products	2001-2033
	* (e) Visual and Auditory Materials of Educational, Scientific, and Cultural Character	2051-2052
	* (f) Customs Service	2071-2081
	- (g) Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals	2091-2095
	* (h) Trade Act of 1974	2101-2495
	* (i) Trade Agreements of Act 1979	2501-2581
	* (j) Convention on Cultural Property	2601-2613
	* (k) Caribbean Basin Economic Recovery	2701-2706
	- (l) Wine Trade	2801-2806
	* (m) United States Canada Free-Trade Implementation Act of 1988	

- Subject: (a) Collection Districts, Ports, and Officers
Title 19, Chapter 1 (19 U.S.C. 1-70)
- (b) Foreign Trade Zones
Title 19, Chapter 1A (19 U.S.C. 81a-81u)
- (c) The Tariff and Related Provisions
Title 19, Chapter 3 (19 U.S.C. 126-580)

Comment: The three chapters of Title 19 considered herein are for the most part irrelevant to the territories, because they concern matters within the U.S. customs territory and the territories are not within that area. One law, however, enacted in 1986 and discussed below at (a), should be amended to refer expressly to the Northern Marianas.

The term "U.S. customs territory" is a term of art, defined to include the States, the District of Columbia, and Puerto Rico only, as explained in Memorandum No. 19-2, part (1). When the term is used in these memoranda on Title 19, the adjective "customs" will precede "territory"--in an attempt to distinguish the "customs territory" from any "territory" to which this study is directed.

Discussion: (a) The first chapter of Title 19, entitled Collection Districts, Ports, and Officers (19 U.S.C. 1-70), concerns the administration and enforcement of the customs laws, and because the territories are outside the U.S. customs territory, the laws appearing here are for the most part irrelevant to them. Three provisions, however, warrant comment, and the third of these should be expanded to refer to the Northern Marianas. First, following 19 U.S.C. 2 there appears a schedule listing "United States Customs Districts and Ports for U.S. Foreign Trade Statistics," in which the Virgin Islands (alone among the territories) appears. An earlier version of that schedule footnoted the reference to the Virgin Islands, stating

The Virgin Islands are not a part of the
U.S. customs area and trade with foreign

countries which enters or leaves through this district is not included in the statistics on U.S. trade with foreign countries.

Although the footnote is not now included (apparently because Virgin Islands foreign trade is now included in U.S. trade statistics), the status of the Virgin Islands as outside the U.S. customs territory of course continues. It is listed because it (alone among the territories) receives assistance from Federal Customs personnel in collecting territorial duties. That assistance has been authorized since 1917, following the U.S. purchase of the Virgin Islands (48 U.S.C. 1395), and it continues under a provision of the Virgin Islands Organic Act of 1936 (48 U.S.C. 1406i).

Second, in order to "aid in the enforcement of the customs and immigration laws" of the United States, the Secretary of the Treasury and the Attorney General are authorized to expend funds for land and buildings in the Virgin Islands and Guam (19 U.S.C. 68).

Third, the special customs status of the territories is recognized in the section pertaining to fees for customs services. The fee that is charged for passengers arriving by commercial vessel or aircraft "from a place outside the United States" (19 U.S.C. 58c(a)(5)) does not apply if the journey originated in "a territory or possession of the United States" (19 U.S.C. 58c(b)(1)(A)). Inasmuch as these provisions derive from an April 1986 law, section 502(a)(2) of the Northern Marianas Covenant does not serve to provide a similar exemption for passengers from the Northern Marianas (but section 502(a)(2) might be inapplicable in any event, since the provision in question is not on its face generally applicable to the "several States"), so the reference to "territory or possession" should be expanded to make express reference to the Northern Marianas. The Customs Service has undertaken to do this by administrative action, by its regulation at 19 CFR 24.22(g)(2)(i), which provides that the fee will not be assessed for passengers arriving from named territories, including the Northern Marianas. But because there may be doubt as to the statutory foundation for the

treatment of the Northern Marianas, an amendment to the law would be desirable. There would seem to be no urgency, however, because the Customs regulation has the practical effect of exempting passengers arriving from the Northern Marianas at this time.

(b) Foreign Trade Zones (19 U.S.C. 81a-81u) are authorized under Chapter 1A of Title 19, which derives from an act of 1934. A foreign trade zone is one created within the U.S. customs territory (19 U.S.C. 81b(b), 81a(c)) into which foreign merchandise may be brought without payment of U.S. tariffs, there to be assembled, or "stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured . . ." (19 U.S.C. 81c(a)). Thereafter the goods may either be reexported, free of duty, or sent into the U.S. customs territory. In the latter event, full U.S. customs duties apply. A foreign trade zone is thus an area geographically within the U.S. customs territory.

Because the territories are outside of the U.S. customs territory, the provisions of this law do not apply to them, and they would not profit if it were applicable. The territories are, in effect, already similar to "foreign trade zones," but they have the added advantage of Headnote 3(a) of the Tariff Act (see Memorandum No. 19-2), so that if the value added in the territory to imported foreign components is sufficiently high, and if the resulting article is a "product of" the territory, it may be brought into the United States customs territory free of duty.

The staff of the Northern Marianas Islands Commission on Federal Laws pointed to a 1980 recommendation from the Pacific Basin Development Conference that the Northern Marianas "study" the creation of a foreign trade zone there, but stated that this would result in "no gain" to the Northern Marianas (Report, Documentary Supplement, p. 367). In light of Headnote 3(a), that conclusion is correct.

(c) The chapter entitled The Tariff and Related Provisions (19 U.S.C. 126-580) contains a miscellany of provisions, enacted over a period of almost 200 years, that pertain essentially to the administration of the customs laws. Many have been repealed, and of those that remain, none contains helpful definitions nor other indications of geographical application--not a surprising omission, inasmuch as many were enacted well before the United States had any offshore areas associated with it. Consistent with the treatment accorded the territories under the customs laws generally, however, it seems appropriate to construe the "United States" and "ports of the United States" when they appear in these laws as applying to the U.S. customs territory. Under that construction the laws in this Chapter 3 of Title 19 are irrelevant to the territories.

One example will suffice. Under a law enacted in 1890 and codified at 19 U.S.C. 181, if the President is "satisfied" that a foreign country has unjustly discriminated against "any product of the United States," he may direct that products of that foreign country "be excluded from importation to the United States." If the President were to take such action, would the foreign products in question be prohibited from entering the territories, as well as the U.S. customs area? Probably not, based on the reasoning that in 1890 there was no association between the United States and the Virgin Islands, Guam, Samoa, or the Northern Marianas; when each association commenced, or soon thereafter, the Congress excluded each from the U.S. customs territory and made special provisions for them; and it is thus reasonable to infer that the Congress did not intend to extend a tariff or customs law to the territories, unless it provided expressly for that result. Such a construction would coincide with long-standing Federal customs policy toward the territories.

Conclusion: The laws discussed herein require no modification to accommodate the territories, except that the law imposing a fee for customs services in connection with arriving passengers (19 U.S.C. 58c(a), 58c(b)(1)(A)) should be expanded to extend the exemption also to the Northern Marianas. There is no urgency in doing so, however, because the Customs Service has so provided by regulation.

Memorandum No. 19-1

Federal agency comments: Comments were requested from the Departments of the Treasury and Justice. All comments received have been reflected above.

Memorandum No. 19-2
July 1988
Revised December 1988

Subject: Tariff Act of 1930
Title 19, Chapter 4 (19 U.S.C. 1202-1677h)

Purpose: To provide for the imposition of tariffs, and their collection, on articles entering the United States customs territory.

Territorial application: The Tariff Act of 1930 provides special rules for the entry into the U.S. customs territory of articles from the Virgin Islands, Guam, American Samoa, and the Northern Marianas. Because these areas are all outside of the U.S. customs territory, tariffs imposed by Federal law on goods imported into them from foreign sources do not apply and are not collected by the Federal Government. In large measure, therefore, the Tariff Act of 1930 is inapplicable to them.

Recommendation: No recommendation is made for any fundamental change in the tariff relationship between the United States and the four areas here involved. But in four particulars, essentially technical in nature, provisions of the Tariff Act should be amended.

Note: Effective January 1, 1989, the Tariff Schedules of the United States will be replaced by the "Harmonized Tariff Schedule of the United States", as required by sections 1207 and 1217 of the Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418, 102 Stat. 1107). One of the purposes to be achieved by the new Harmonized Tariff Schedule, to be known as HTS, is to change the nomenclature in U.S. law so that it conforms to that "established internationally by the Convention" on the Harmonized Commodity Description and Coding System (sec. 1201). One such change in nomenclature results in substituting for "Headnote 3(a)" the new term "General Note 3(a)(iv)". The latter, however, does not differ in any particular in substance (and in only minor particulars in actual wording) from the existing Headnote 3(a). Inasmuch as those who deal with customs matters and the U.S. territories have long grown accustomed to the "Headnote 3(a)" usage, and because they are likely to continue to use it for some time in

the future, that usage is perpetuated here. But references to the new terminology and new citations will also be provided from time to time, to aid the user of this study after January 1989. Because the Omnibus Trade and Competitiveness Act of 1988 has not at the time of this writing been codified, it will not be analyzed generally for purposes of these memoranda on Title 19. The new Harmonized Tariff Schedule, published by the U.S. International Trade Commission, is, however, available, and it will be referred to from time to time herein.

Discussion: Because the Tariff Act of 1930 does not for the most part apply to the territories, a section-by-section analysis of it of the sort usually employed in this study is not required. Instead, there will be presented below a discussion of (1) Headnote 3(a) (General Note 3(a)(iv) in the HTS), which is of central significance to the territories in connection with the Federal customs laws, (2) the tariff treatment of the territories historically under Federal law, (3) the authority and practice of the territories in imposing local duties, (4) sections of the Tariff Act of interest to the territories, and (5) sections that ought to be amended.

(1) Headnote 3(a) (effective January 1, 1989, termed General Note 3(a)(iv)).

Duties imposed on articles imported into the United States customs territory are no longer set forth in the Tariff Act of 1930 as such. They are contained instead in the Tariff Schedules of the United States (the Harmonized Tariff Schedule of the United States), supplemented and republished from time to time by the United States International Trade Commission. This massive publication contains not only the rates of duty on particular articles, but also headnotes (or general notes)--some of major significance. The rates of duty and the notes for the most part have the status of statutory law, but they may be changed either by the Congress or by administrative action pursuant to law.

The Tariff Schedules contain, in the pages that precede the schedules showing the rates of duty that are imposed on

particular articles, General Headnotes and Rules of Interpretation. General Headnote 1 (General Note 1 of the HTS) states simply that articles imported into the U.S. customs territory are subject to duty or exempt, as later provided; Headnote 2 (General Note 2) defines "customs territory of the United States" to include only the States, the District of Columbia, and Puerto Rico; and Headnote 3 (General Note 3) in its early language requires the payment of the duties set forth in the tariff schedules that follow, but with exceptions. The first such exception is "Products of Insular Possessions", contained in (a) (hence, Headnote 3(a)). (Other exceptions that follow include products of Beneficiary Developing Countries, of Beneficiary Countries under the Caribbean Basin Act, and others.)

Headnote 3(a) provides that with three exceptions described below, articles imported into the U.S. customs territory from U.S. "insular possessions" are subject to duty,

except that all such articles the growth or product of any such possession, or manufactured or produced in any such possession from materials the growth, product, or manufacture of any such possession or of the customs territory of the United States, or of both, which do not contain foreign materials to the value of more than 70 percent of their total value (or more than 50 percent of their total value with respect to articles described in section 213(b) of the Caribbean Basin Economic Recovery Act), coming to the customs territory of the United States directly from any such possession . . . are exempt from duty.

(General Note 3(a)(iv) of the HTS is the same, except that the word "articles", just preceding the reference to the Caribbean Basin Economic Recovery Act, has been changed to "goods".)

Headnote 3(a) further provides that in determining the 70 percent valuation, foreign material that is duty-free is not considered "foreign;" that articles under section 503 of the

Trade Act of 1974 may be imported from an insular possession on as favorable terms as such articles imported from "a beneficiary developing country" under that Act; and that articles under section 213 of the Caribbean Basin Economic Recovery Act may be imported from an insular possession on as favorable terms as such articles imported from a beneficiary country under that Act. (General Note 3(a)(iv) contains provisions that parallel the foregoing.)

To understand the effect of Headnote 3(a) (or General Note 3(a)(iv) of the HTS), it becomes necessary to describe the three exceptions that precede the language quoted above, and to describe the other internal statutory references contained elsewhere in the note. As to the three categories of articles excepted from the general duty-free provision quoted above,

-- "headnote 6 of subpart E of part 2 schedule 7" in Headnote 3(a) (the reference to which, in the HTS, is "additional U.S. note 5 of chapter 91"), refers to watches and watch movements imported into the U.S. customs territory from the Virgin Islands, Guam, and American Samoa (and, as recently added by administrative action (15 C.F.R. Part 303), the Northern Marianas--but that addition is not reflected in the note itself.) The headnote provides that they may enter duty-free if, without regard to the value of their foreign components, they otherwise conform to the various note requirements and are within the quantity ceiling that is imposed. The ceiling is established annually by the Secretaries of Commerce and the Interior, and it cannot exceed 10 million units or one-ninth of apparent U.S. consumption, whichever is the greater. That ceiling is divided among the territories, and under the formula provided, the Virgin Islands receives the lion's share. The Secretaries then allocate to producers within each watch-producing territory portions of that territory's quota, with allocations based on wages paid to permanent residents of the territory who are employed by the producer--for the purpose of encouraging local employment at reasonable wage levels. Because American Samoa and the Northern Marianas have no watch industry at this time, no allocations are made to "producers" there, but a portion of the overall ceiling is reserved by the Secretaries for each of them, in the event a watch industry should commence in either of those areas.

-- "headnote 3 of subpart A of part 7 of schedule 7" in Headnote 3(a) (the reference to which, in the HTS, is "additional U.S. note 3 of chapter 96"^{1/}), refers to buttons. Buttons made from acrylic resin or of polyester resin that "are the product of an insular possession" and that are "manufactured or produced from button blanks or unfinished buttons which were the product of any foreign country" are dutiable as they would be if produced in that foreign country.

-- "section 423 of the Tax Reform Act of 1986" (Pub. L. 99-514, 100 Stat. 2085, 2230), provides that ethyl alcohol or a mixture thereof is not eligible for a duty exemption under Headnote 3(a) "unless the ethyl alcohol or mixture thereof is an indigenous product of that insular possession . . .". Section 423 of the 1986 tax act was amended by section 1910 of the 1988 Trade Act (P.L. 100-418, 102 Stat. 1107, 1319), but the changes made do not appear to be important for current purposes.

As to other internal statutory references,

-- "section 213(b) of the Caribbean Basin Economic Recovery Act" (19 U.S.C. 2703(b)) provides that duty-free treatment accorded to beneficiary countries of the Caribbean under that Act does not apply to five kinds of articles: (i) certain textile and apparel articles (ii) certain footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel, (iii) tuna, in airtight containers, (iv) petroleum and its derivatives, and (v) watches and watch parts containing any material produced in particular (generally Communist) countries.

-- section 503 of the Trade Act of 1974 (19 U.S.C. 2463) provides for the duty-free entry of "eligible articles" (defined to include some of the articles listed in section

^{1/} The reference to "note 3" should be "note 2". The additional U.S. notes to chapter 96 are two in number only, and the second deals with the appropriate subject matter.

213(b) of the Caribbean Basin Economic Recovery Act discussed above, plus a few others) as designated by the President, imported into the U.S. customs territory from beneficiary developing countries, as designated by the President--but only if the materials produced in such developing country plus the cost of processing there total 35% of the value of the article upon importation into the United States.

-- section 213 of the Caribbean Basin Economic Recovery Act (19 U.S.C 2703) provides in general for the duty-free entry into the U.S. customs territory of articles that are the growth, product, or manufacture of a beneficiary country of the Caribbean--but only if the materials produced in the beneficiary country plus the cost of processing there totals 35% of the value of the article upon importation into the United States, and only if substantial transformation has taken place in the beneficiary country. As stated above, five categories of articles are excluded from this duty-free treatment, and numerous other qualifications also apply.

The net effect of the foregoing is that the territories--the Virgin Islands, Guam, Samoa, and the Northern Marianas--retain an advantage under the U.S. customs laws over beneficiary developing countries (under the Trade Act of 1974) and over beneficiary countries (under the Caribbean Basin Economic Recovery Act), because in the case of most products, they need add in the territory only 30%, instead of 35%, of the value of the article. Moreover, because the 30% and 35% are computed differently, the territories advantage exceeds the apparent 5%. The 30% value added may include profit, overhead, transportation, and other costs that cannot be counted in the 35% cost of processing under either the Trade Act or the Caribbean Basin Economic Recovery Act. And, in the case of articles that cannot enter duty-free under the Caribbean Basin Economic Recovery Act (i.e., the five listed above), such articles can enter duty-free from the territories if the value of the foreign materials does not exceed 50%, and if substantial transformation has taken place in the territory.

The benefits of Headnote 3(a) to the territories are great, although less than is commonly supposed. Headnote 3(a) is an important basis for the tuna canning industry in American

Samoa, which is the mainstay of Samoa's economy and its only significant private sector endeavor; it is the basis for the watch industry in the Virgin Islands and Guam, industries of importance to each, although not central to their economic activity; it has also permitted a varied garment industry (including sweater manufacturing) in the Northern Marianas--which is one of the largest private sector employers in that area--and smaller garment industries in both Guam and the Virgin Islands.

But it is also clear that Headnote 3(a) is no panacea, and that its benefits can be and have been limited by other Federal legislation. In 1966, when the importation under Headnote 3(a) of watches created from foreign components in the Virgin Islands and Guam grew sufficiently to threaten mainland producers, the quota system--now evidenced by the "headnote 6" exception above--was first instituted (by Public Law 89-805, 80 Stat. 1521). In 1984, new rules of origin were administratively imposed, so as to thwart the sweater industries that had recently arisen in Guam and the Northern Marianas, and elsewhere. A practice had developed whereby sweater components, knitted in foreign areas, were brought to Guam and the Northern Marianas and to many foreign areas, there to be sewn together to make sweaters. Quotas under 7 U.S.C. 1854 (see Memorandum No. 7-4(t)) were already in effect to control imports from foreign countries. In 1984 the rules of origin were changed so that the origin of the sweaters reverted back to the country where knitting took place. But quota exemptions were provided to protect (i.e., to "grandfather") existing Guam and Northern Marianas production. The effect, however, was obviously to limit the territorial businesses.^{2/} On the other hand, numerous legislative

^{2/} Sweaters from the territories have lately, however, been made subject to new rules as a result of the 1988 trade legislation. Section 1736 of Public Law 100-418 (102 Stat. 1107, 1280) provides a statutory quota exemption for Guam, so long as the sweaters are assembled by 100% local labor (i.e., U.S. citizens, U.S. nationals, and aliens admitted for permanent residence). Congress imposed the 100% local labor requirement because of a sensitivity about the use of alien laborers to obtain Headnote 3(a) benefits. A similar quota exemption was not enacted for the (continued...)

threats to the Samoa tuna industry have not yet succeeded. But the territories rightly believe that a territorial industry that achieves success because of Headnote 3(a) is vulnerable to direct or collateral attack if mainland manufacturers feel threatened by the competition.

One further observation concerning Headnote 3(a) (and General Note 3(a)(iv) of the HTS) deserves mention. As currently worded, the headnote requires that to achieve duty-free entry, the product of the insular possession must be the growth or product of the insular possession, and must also meet the percentage requirement as to value added in the insular possession. The U.S. Customs Service has so interpreted the language (50 Fed. Reg. 8710, 8712). The predecessors of Headnote 3(a) did not impose this two-fold test, providing instead for duty-free entry of either products of the insular possession, or products meeting the percentage requirement. The matter is discussed at some length in documents of the Northern Marianas Federal Laws Commission (Documentary Supplement, August 1985, pp. 371-372), where it is argued that the Customs Service interpretation is in conflict with the Congress' intent. The Customs construction is, however, intended to deny duty-free entry to a "pass-through" product. Because articles can enter duty-free with only 30% (or in a few cases, 50%) in value added, including profit, overhead, and transportation, a choice of tests could permit the duty-free entry of articles not even touched by workers in a territory.

^{2/}(...continued)

Northern Marianas, because the Northern Marianas was unwilling to accept a 100% local labor requirement. (Most employees of the Northern Marianas sweater industry are nonresident alien workers.) Consequently, sweaters from the Northern Marianas may become subject to both quotas and duty. The Northern Marianas has argued that it is entitled to the same quota exemption as Guam in light of section 603(c) of the Covenant. But even if that argument were successful, the Northern Marianas would gain no benefit because of the 100%-local-labor string that would be attached to the quota exemption.

It should be noted that the Freely Associated States of the Marshalls and the Federated States of Micronesia receive tariff treatment that is less favorable than that accorded the territories. As originally negotiated, the Compact of Free Association provided in section 242 that products of the Freely Associated States would receive the same treatment as products of the territories under Headnote 3(a). But in enacting the Compact of Free Association Act of 1985 (appearing as a note following 48 U.S.C. 1681), the Congress in section 401 modified section 242--among other things by imposing a ceiling on canned tuna, and by excluding some articles from duty-free treatment (watches, buttons, certain textile articles, certain footwear, handbags, and others). Section 242 provides for a Presidential proclamation that has not at this writing been issued.

(2) Historic treatment of the territories under Federal customs laws.

A quick summary of the manner in which the U.S. has treated off-shore areas for customs purposes may be helpful here. Nineteenth century territorial acquisitions--in the western United States, Alaska, and Hawaii--all resulted in effect in the expansion of the U.S. customs territory to include such areas. All of them, including Alaska and Hawaii, were and are within the U.S. customs territory. But the 1898 acquisitions following the Spanish American War--of Puerto Rico, the Philippines, and Guam--brought different results for them, grounded in the Insular Cases of 1901 (principally DeLima v. Bidwell, 182 U.S. 1, and Downes v. Bidwell, 182 U.S. 244). These cases gave rise to the principle of territorial incorporation, by which the incorporated territories of Alaska and Hawaii were viewed as inchoate States, to which the provisions of the U.S. Constitution fully applied; and by which Puerto Rico, the Philippines, and Guam (and later, the Virgin Islands and American Samoa) were termed "unincorporated territories," to which only "fundamental" constitutional protections extended. The effect of the decisions for customs purposes was to hold that the unincorporated territories, once acquired by the U.S., were not "foreign" for customs purposes, so that territorial products entering the U.S. customs territory were not automatically subject to the duties that would apply to foreign products; but also that the uniformity

clause of the Constitution (Article I, Section 8, Clause 1, requiring that "all Duties . . . shall be uniform throughout the United States") did not apply--thereby permitting the Congress for customs purposes to treat an unincorporated territory differently from a State.

In exercising that authority, Congress provided that Puerto Rico, by its 1900 Organic Act, would be within the U.S. customs territory (Sec. 2, Act of April 12, 1900, 31 Stat. 77), and there it has since remained. But Puerto Rico is not treated precisely as are the States. Puerto Rico is authorized by the Tariff Act of 1930 to impose its own duty upon coffee entering Puerto Rico from foreign or U.S. sources (19 U.S.C. 1319), and it has done so (19 U.S.C. 1319a).

The Philippine Islands would under a 1902 law be treated as "foreign" under the U.S. customs laws, except that "all articles the growth or product of the Philippine Archipelago" would be subject to only 75% of the regular duties (Act of March 8, 1902, 32 Stat. 54). This provision was changed in the Tariff Act of 1909 to provide (in words similar to those of the current Headnote 3(a)) that

all articles, the growth or product of or manufactured in the Philippine Islands from materials the growth or product of the Philippine Islands or of the United States, or of both, or which do not contain foreign materials to the value of more than twenty per centum of their total value

can be admitted free of duty (36 Stat. 11, 83). With minor variations, that provision continued through and including the Tariff Act of 1930, with further and specialized provisions being enacted in connection with Philippine independence.

The Virgin Islands, upon their acquisition in 1917, would be treated in a manner parallel to the Philippines under the 1909 law. That is,

all articles, the growth or product of, or manufactured in, such [Virgin] islands, from materials the growth or product of such islands or of the United States, or of both, or which do not contain foreign materials to the value of more than 20 per centum of their total value . . . coming into the United States from such island shall be admitted free of duty. (48 U.S.C. 1394.)

In the 1954 Revised Organic Act of the Virgin Islands, the permissible foreign content was raised from 20 percent to 50 percent.

Guam, in its 1950 Organic Act, would be subject to a provision similar to the Virgin Islands, except there was no foreign content provision of the sort the Philippines had enjoyed from 1909, or the Virgin Islands from 1917. The Guam Organic Act provided in section 27 simply that

Articles which are the growth, production or manufacture of Guam coming into any State, Territory or insular possession of the United States from Guam shall be entered at the several ports of entry free of duty. (64 Stat. 392.)

But in 1954, soon after enactment of the provision referred to above from the 1954 Revised Organic Act of the Virgin Islands, the Congress enacted the Customs Simplification Act, which extended to all "insular possessions" the customs treatment recently enacted for the Virgin Islands, with the 50% foreign content provision (68 Stat. 1136, 1139). The positions of Guam and the Virgin Islands were then equalized.

American Samoa, which had not earlier been the subject of Federal customs legislation, became in 1954 by enactment of the Customs Simplification Act the beneficiary of the same treatment accorded by that Act to the Virgin Islands and Guam. That is, products of Samoa also could enter the U.S. customs territory duty-free if they were either the growth or product

of Samoa, or if they did not contain foreign materials in excess of 50% of their value.

The Northern Marianas would be treated approximately in the same manner as Guam. Section 603 of the Northern Marianas Covenant, which is the only Federal law that deals expressly with customs matters in the Northern Marianas, provides

-- in subsection (a), that the Northern Marianas are not within the U.S. customs territory;

-- in subsection (b), that the Northern Marianas may levy its own duties on goods imported there, except for goods imported from the U.S. customs territory;

-- in subsection (c), that imports from the Northern Marianas into the U.S. customs territory "will be subject to the same treatment as imports from Guam into the customs territory of the United States"--thereby placing the Northern Marianas in the category of "insular possessions" for purposes of Headnote 3(a); and

-- in subsection (d), that the U.S. will encourage other countries to give favorable treatment to exports from the Northern Marianas and to treat it as a developing country--a provision not applicable to any of the other territories.

The 50% foreign component provision of the 1954 law was changed to 70% in 1983, subject to the exceptions and elaboration offered above in the discussion of Headnote 3(a) (General Note 3(a)(iv) of the HTS) as it stands today.

The net effect of the foregoing is that articles from the Virgin Islands, Guam, Samoa, and the Northern Marianas may enter the U.S. customs territory free of duty, if they meet the requirements of Headnote 3(a). These four areas receive

the same treatment--except that loose ends remain in the case of the Northern Marianas, as discussed under point (5) below.

(3) Local territorial duties.

With respect to articles entering the Virgin Islands, Guam, Samoa, or the Northern Marianas from foreign sources, that is, sources outside the U.S. customs territory, customs duties, denominated as such, are not now imposed in any but the Virgin Islands. Given the economic value to these areas of free-port status, or, in the case of the Virgin Islands, almost free-port status, it is unlikely that any will be disposed to impose territorial customs duties.

At the time of enactment of the Guam Organic Act in 1950, Guam's laws provided for customs duties, but all such laws were repealed soon after and Guam has since been a genuine free port.

Both Samoa and the Northern Marianas impose excise taxes that are collected upon imported items--beer, alcoholic beverages, tobacco products, soft drinks, and the like--but they are termed "taxes", not "duties", although they would seem to have the same practical effect. Samoa abolished all "import duties" effective June 1, 1967, because, as its Legislature stated,

of the desire of the Legislature for immediate abolition of customs duties and the advantages which will accrue to the economy of American Samoa. (American Samoan Code, sec. 11.1020.)

The Samoan Code sometimes uses the terms "excise taxes" and "customs duties" interchangeably (sec. 11.1001). The Northern Marianas laws appear not to use the term "customs duties", but they do provide for "duty-free shops" which can be exempt from pertinent local excise taxes.

The Virgin Islands are peculiar, owing to the Congress' action in 1917 in perpetuating the 1906 Danish law that imposed a 6% ad valorem duty upon goods entering the Virgin Islands. Some imported goods were excepted from the 1906 law, and all imports from the U.S. were exempted by the 1917 law. That law, because of its Federal origin (48 U.S.C. 1395) could not be modified by action of the Virgin Islands Legislature until 1977, when Congress amended the 1954 Organic Act expressly to permit the Legislature to reduce or repeal the 6% ad valorem duty (48 U.S.C. 1574(f)). The Virgin Islands Legislature has since reduced or eliminated duties on many articles.

The territories would all have authority to impose duties upon goods imported from foreign sources, that is, from outside the U.S. customs territory, if they chose to do so--sometimes explicitly subject to limitations (see, for example, section 603(b) of the Northern Marianas Covenant). Whether they would have authority to impose duties on articles imported from the U.S. customs territory is less clear in two cases, but almost certainly of academic interest only because there is no known disposition to do so. The Virgin Islands and the Northern Marianas are both barred from imposing duties on imports from the U.S., the Virgin Islands by a 1917 law (48 U.S.C. 1395), and the Northern Marianas by section 603(b) of its Covenant. There is no similar statutory bar in the case of either Guam or American Samoa, although it should be noted that in its proposed Commonwealth Act (H.R. 4100, 100th Cong.), Guam itself proposes a reciprocal bar to customs duties between the U.S. and Guam (section 501(b)).

(4) Tariff Act sections of interest to the territories.

Because the territories here in question are excluded from the U.S. customs territory, the bulk of the provisions of the Tariff Act of 1930 are irrelevant to them. In a few instances, however, the result is of some interest, and those instances are discussed here.

There appears at 19 U.S.C. 1401(h) a definition of the term "United States" as including

all Territories and possessions of the United States except the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, and the island of Guam.

The Virgin Islands, Samoa, and Guam were all excluded from the "United States" in the manner stated above when the definition was enacted in 1930 (46 Stat. 590, 708). Wake, Midway, and Kingman Reef were added in 1938, and Johnston in 1955. The definition applies to sections of the Tariff Act codified at 19 U.S.C. 1303-1323 and 1401-1654. The application of the definition leads to the following results:

-- 19 U.S.C. 1304 restricts the entry of foreign goods into "the United States" unless marked as to country of origin. The restriction does not apply to foreign goods entering the territories that are excluded from the "United States" under 19 U.S.C. 1401(h), but it might bar such goods from entering the Northern Marianas. Guam's exclusion would not serve under section 502(a)(2) of the Covenant to provide a similar exclusion for the Northern Marianas. It may be, however, that the Northern Marianas' exclusion from the U.S. customs territory by section 603(a) of the Covenant would permit its exclusion from the "the United States" under 19 U.S.C. 1401(h).

-- 19 U.S.C. 1305 and 1306 present the same uncertainty. The first prohibits importation into "the United States" of articles that are subversive or obscene, or that are lottery tickets; 19 U.S.C. 1306 prohibits importation into "the United States" of animals or meat products from countries where rinderpest or foot-and-mouth disease exists. The prohibitions would not apply to the Virgin Islands, Guam, or Samoa, given the definition at 19 U.S.C. 1401(h). They arguably would apply in the Northern Marianas, in the manner discussed with respect to 19 U.S.C. 1304. (But the animal inspection laws found at 21 U.S.C. 101-135b would have approximately the same prohibitive effect as to all of the territories. See Memorandum No. 21-2.)

-- 19 U.S.C. 1307 prohibits importation into "the United States" of convict-made goods, and on the rationale explained as to 19 U.S.C. 1304, the prohibition does not apply to the territories, except arguably it does apply to imports into the Northern Marianas. It is likely, however, that provisions in the Criminal Code as to convict-made goods (18 U.S.C. 1761, see Memorandum 18-1) would have approximately the same prohibitive effect.

-- 19 U.S.C. 1313 pertains to "drawbacks." When an article that is manufactured in the U.S. using "imported merchandise" on which duties have been paid is exported from the U.S., then 99% of the duties paid are refunded as a drawback. Rather surprisingly, the territories do not benefit from this provision, notwithstanding their exclusion from the "United States" by 19 U.S.C. 1401(h). (The Staff of the Northern Marianas Commission assumed that drawbacks were available for goods manufactured or produced in the "United States" and thereafter shipped to the territories, and it apparently further assumed that the Northern Marianas would benefit from the same drawback treatment by operation of law, although that was unexplained in its memorandum. (Documentary Supplement, August 1985, pp. 375-376.)) The pertinent Customs regulation provides in part that

. . . under 19 U.S.C. 1313, there is no authority of law for the allowance of drawback of Customs duty on articles manufactured or produced in the United States and shipped to Puerto Rico, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Guam, Canton Island, Enderbury Island, Johnston Island, or Palmyra Island. (19 CFR 191.13.)

That regulation is based on the theory that the phrase "exportation of articles" as used in 19 U.S.C. 1313 is a term of art meaning only exportation to foreign countries, and thus that it does not include shipments to domestic areas even if they are outside of the U.S. customs territory. That has been the Treasury Department's position since an administrative decision of 1901, and two court decisions squarely uphold it. That is, an "exportation" for drawback purposes must involve

a shipment to a foreign country, and a shipment to Guam, for example, cannot be an "export". It was so held in John Rothschild & Co. v. U.S. (16 Court of Customs Appeals 442 (1929)) and Mitsubishi International Corp. v. U.S. (55 Customs Court 319 (1965)). To hold that a shipment to a territory qualifies as an "exportation" would, the latter case holds, constitute "judicial legislation" (at p. 327). Mitsubishi offers two reasons why the Congress may have meant to exclude the territories from the drawback benefit. First, the court points out that the drawback on exports is intended "to encourage manufacturing in this country", and it would be "strange" if Congress in a single measure sought not only to do that, but also to encourage manufacturing in the territories--this by enacting the predecessor of the current Headnote 3(a) (soon to be General Headnote 3(a)(iv)). The result, the court observed, would be "to intensify competition offered insular producers by manufacturers from the continental United States". So the exclusion of the territories from the drawback benefit, the court said, is not "anomalous or inadvertent" (at p. 327). The second justification that the court found for the territories' drawback treatment relates to balance of payments. The court observed that

. . . an "export", in the strict definition, obtains national advantages with respect to the balance of payments, but this cannot be said of shipments to insular possessions which are themselves in the dollar area. (At pp. 327-328.)

The effect of the territories' exclusion from the drawback benefit is, however, to accord to them for this drawback purpose treatment less generous than that accorded foreign countries. The two explanations offered by the Mitsubishi court are short of compelling: there is not now, and there was not when the decision was announced in 1965, and there is not likely to be in the foreseeable future, territorial manufacturing activity that would be damaged by competition from duty-free shipments of U.S. manufactured articles from the U.S. customs territory. And the balance of payments consequences are not likely to rise about the de minimis. The

most reasonable explanation for the territories' exclusion from the section 1313 drawback benefit is probably Congressional oversight. This seems particularly likely because most of the territories do benefit from the somewhat similar bonded warehouse law at 19 U.S.C. 1551-1565--discussed below in part (5) of this Memorandum No. 19-2.

Informal discussions with Customs representatives suggest that Customs and the Treasury Department would be unenthusiastic about legislation to confer the drawback benefit on the territories. In addition to the Mitsubishi reasons, a further objection was suggested, to the effect that an article on which drawback had been allowed might later be returned, duty-free, from the territory to the U.S. customs territory--given the leniency of Headnote 3(a)--thereby depriving the Federal Treasury of duties that ought to apply. But that could occur only if Headnote 3(a) were not properly enforced, so that objection does not seem compelling.

In the circumstances, an amendment to the law--so that the territories are treated no less generously than foreign countries--appears to be warranted. It could be achieved by defining "exportation" in 19 U.S.C. 1313(a) to include shipments to the Virgin Islands, Guam, Samoa, and the Northern Marianas (perhaps among others). The Northern Marianas should be expressly included, for no provision of existing law would unarguably operate to achieve that result.

-- 19 U.S.C. 1321(a)(2) authorizes the Secretary of the Treasury to allow the duty-free entry of gifts sent to persons in the U.S. from outside the U.S. customs territory, to a value of \$50 for gifts sent from "foreign countries," and \$100 for gifts sent from the Virgin Islands, Guam, and Samoa. In light of section 603(c) of the Covenant, gifts from the Northern Marianas are also subject to the \$100 limitation.

-- 19 U.S.C. 1336, 1337, and 1338 all concern powers of the U.S. International Trade Commission. These sections contain their own definitions (and the definition at 19 U.S.C. 1401(h) does not apply here), and the results appear to be consistent with the tariff treatment of the territories

generally. To illustrate: 19 U.S.C. 1336 authorizes the Commission to investigate differences in production costs of "domestic" articles and comparable "foreign" articles, and to recommend changes in duties to reduce such differences. A "domestic article" is one grown or produced in the "States and Territories and the District of Columbia" (19 U.S.C. 1336(h)(2)), and a "foreign article" is one produced in a foreign country and explicitly not in a U.S. possession (19 U.S.C. 1336(h)(3)). Given the date of enactment of these definitions (1930), when only Alaska and Hawaii were incorporated territories (i.e., "Territories"), the definition of "domestic" clearly excludes the Virgin Islands, Guam, Samoa, and the Northern Marianas--so their costs of production would not be susceptible to Commission investigation. Under 19 U.S.C. 1337, the Commission may exclude articles from entry into the "United States" if the imported articles are the result of unfair methods of competition or are substantially injurious to U.S. industry. "United States" for this purpose means the U.S. customs territory (19 U.S.C. 1337(j)), so that the Commission is not empowered to act to protect industry in the territories, but it could restrict the importation of articles from the territories to the U.S. customs area if such articles compete unfairly with goods made in the U.S. or injure competition in the U.S. Under 19 U.S.C. 1338, the President may exclude from importation into the "United States" articles from "foreign countries" that engage in certain kinds of discrimination against articles of the United States. The definition of "United States" (as meaning the U.S. customs territory) at 19 U.S.C. 1337(j) applies here, and a "foreign country" does not mean a U.S. possession, or territory (19 U.S.C. 1337(j)). Accordingly no action could be taken under this section to exclude territorial articles from importation into the U.S., nor could action be taken to protect territorial exports from discrimination by foreign countries.

-- 19 U.S.C. 1526 and 1527 prohibit the importation into the "United States" of, respectively, foreign goods bearing a U.S. trademark if the U.S. trademark owner has not consented, and wild mammals and birds in violation of foreign law. The definition of "United States" appearing at 19 U.S.C. 1401(h) applies, so the problem identified above under 19 U.S.C. 1304 again appears. That is, because the Virgin Islands, Guam, and Samoa are excluded from the "United States"

by the definition, these prohibitions would not apply to them. But because the Northern Marianas is not there excluded, its position is less certain, although its exclusion from the U.S. customs territory under section 603(a) of the Covenant should serve to place it in the same position as the other territories.

-- 19 U.S.C. 1671-1677h are provisions on countervailing and antidumping duties, added in 1979 to the Tariff Act of 1930. These provisions are designed to protect "an industry in the United States" from injury, a threat of injury, or retardation arising from foreign subsidies on foreign exports, or from sales in the U.S. of foreign merchandise at less than fair value. Machinery is provided for the imposition of a countervailing duty or an antidumping duty to meet that circumstance. Although no definition of "United States" appears, the term could logically mean the U.S. customs territory only, inasmuch as the modification of U.S. duties must be confined to the areas where they are by law collected. But note that for purposes of the import relief provisions contained in Chapter 1 of Title II of the Trade Act of 1974, an "industry" in the United States does include producers in the "insular possessions". The provision derives from the Caribbean Basin Economic Recovery Act. See the note following 19 U.S.C. 2251, and Memorandum No. 19-3(h).

Two further subjects warrant mention.

Item 813.31 of the Tariff Schedules pertains to the duty-free status of goods purchased by returning residents of the U.S. customs territory. A resident may import without payment of duty goods valued at not more than \$400, but if arriving from "American Samoa, Guam, or the Virgin Islands of the United States," the exemption is \$800 (of which no more than \$400 can be attributable to goods acquired outside those three named areas). The permitted limit on alcoholic beverages and cigarettes is also higher for the territories than for foreign areas. Although unnamed in Item 813.31, the Northern Marianas benefits from the same provisions as the Virgin Islands, Guam, and Samoa, in light of section 603(c) of the Covenant, which provides that imports from the Northern Marianas into the U.S.

customs territory receive "the same treatment" as imports from Guam.

Citizenship requirements are imposed by various provisions of Title 19: section 1330(a), requiring that members of the International Trade Commission be U.S. citizens; section 1498(a)(9), permitting the duty-free entry of the personal effects of U.S. citizens who have died abroad; section 1526(a), which protects trademark owners who are U.S. citizens; and section 1641(b), requiring customhouse brokers to be U.S. citizens. A noncitizen national of the United States in Samoa would not qualify for purposes of these provisions (although Samoans are generally fully covered by the Federal Trademark laws, see Memorandum No. 15-5(j)), but none seems likely to pose a realistic problem.

(5) Sections that ought to be amended.

Because the territories all benefit--to a considerable extent actually, and to a larger extent potentially--from their exclusion from the U.S. customs territory and from the special treatment afforded them under Headnote 3(a) (General Note 3(a)(iv) of the HTS), it seems wise to refrain from suggesting any basic change in their treatment under the U.S. customs laws. But an examination of Chapter 4 of Title 19 discloses four areas where amendments would have value. Given the current dimensions of economic activity in the four areas here involved, the changes recommended cannot be viewed as urgent--perhaps excluding the change as to drawbacks--but they would be desirable for the reasons set forth below.^{3/}

(i) The drawback provision at 19 U.S.C. 1313 should be amended as discussed above, so that shipments to the

^{3/} If it is contended that some of these suggestions result from an excess of tidiness, it should be observed that this is not a valid objection, inasmuch as the U.S. has already legislated on the subject of articles imported into the U.S. customs territory from outer space (19 U.S.C. 1484a).

territories are subject to the same drawback benefit as are exportations to foreign countries.

(ii) The definition of "United States" at 19 U.S.C. 1401(h) should be modified so as to exclude the Northern Marianas, thereby placing it in the same position as the other territories. That would eliminate the ambiguity as to the application to the Northern Marianas of the prohibitions identified above and appearing at 19 U.S.C. 1304-1307, 1526, and 1527.

(iii) Provisions of the Tariff Act appearing at 19 U.S.C. 1551-1565 pertain to transportation in bond and to bonded warehouses. They permit the transportation and storage of imported merchandise on which duties have not been paid. Duties must be paid when the merchandise is removed from the bonded warehouse, unless it is to be transported to a foreign country or "to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam" (19 U.S.C. 1557(a)). A companion provision, concerning the repackaging of bonded merchandise, contains the same list of areas (19 U.S.C. 1562). None of the laws that sometime operate to extend provisions to the Northern Marianas (e.g., section 502(a)(2) or section 603 of the Covenant) operates to do so here, so those two sections should be amended by adding the Northern Marianas to the list.

(iv) As a result of a 1986 law, officers of the Customs Service may be stationed in foreign countries (19 U.S.C. 1629), but there appears to be no similar, explicit authority for stationing them in the territories, except for the Virgin Islands (48 U.S.C. 1406i). There are other sources of authority which, perhaps with straining, might be utilized for that purpose (e.g., 48 U.S.C. 1469c), but it could prove helpful to have a more straightforward basis. Both the United States Government and the territories could benefit from a Customs presence in the territories, so there could be value in providing an authorization.

Conclusion: The Tariff Act of 1930 ought to be amended in four particulars, described in part (5) above. Of these, the most

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important is the extension to the territories of the drawback benefit of 19 U.S.C. 1313.

Federal agency comment Comments were requested from the Departments of Justice and the Treasury. All comments received have been reflected above.

Memorandum No. 19-3
May 1988
Revised December 1988

- Subject:
- (a) Smuggling
Title 19, Chapter 5 (19 U.S.C. 1701-1711)
 - (b) Trade Fair Program
Title 19, Chapter 6 (19 U.S.C. 1751-1756)
 - (c) Trade Expansion Program
Title 19, Chapter 7 (19 U.S.C. 1801-1982)
 - (d) Automotive Products
Title 19, Chapter 8 (19 U.S.C. 2001-2033)
 - (e) Visual and Auditory Materials of Educational,
Scientific, and Cultural Character
Title 19, Chapter 9 (19 U.S.C. 2051-2052)
 - (f) Customs Service
Title 19, Chapter 10 (19 U.S.C. 2071-2081)
 - (g) Importation of Pre-Columbian Monumental or
Architectural Sculpture or Murals
Title 19, Chapter 11 (19 U.S.C. 2091-2095)
 - (h) Trade Act of 1974
Title 19, Chapter 12 (19 U.S.C. 2101-2495)
 - (i) Trade Agreements Act of 1979
Title 19, Chapter 13 (19 U.S.C. 2501-2581)
 - (j) Convention on Cultural Property
Title 19, Chapter 14 (19 U.S.C. 2601-2613)
 - (k) Caribbean Basin Economic Recovery
Title 19, Chapter 15 (19 U.S.C. 2701-2706)
 - (l) Wine Trade
Title 19, Chapter 16 (19 U.S.C. 2801-2806)
 - (m) United States-Canada Free-Trade Agreement
Implementation Act of 1988

Comment: The chapters of Title 19 that are discussed herein contain numerous laws of some interest to the territories, but

their current application or inapplication to them seems in all instances appropriate--except for the Anti-Smuggling Act ((a) below), which ought to be made inapplicable to the Northern Marianas, so that all of the territories will be accorded the same treatment.

Discussion: (a) The chapter entitled Smuggling (19 U.S.C. 1701-1711) contains the Anti-Smuggling Act, enacted in 1935. Its purpose is to deter the unlawful introduction or removal into or from the United States of any merchandise or person. To achieve this purpose, the President is authorized to designate areas on the high seas as customs-enforcement areas by virtue of the presence of any "hovering vessel" (i.e., a vessel found or kept off the coast of the U.S. that it is reasonable to believe is being used or may be used to introduce or promote or facilitate the introduction or attempted introduction of merchandise into the U.S. in violation of customs laws, 19 U.S.C. 1709(d)). All United States vessels in a customs-enforcement area may be boarded or searched by U.S. Customs officers, and subjected to seizure and forfeiture if found to be employed to defraud the revenue or to smuggle any merchandise into the United States. The "United States" is defined to include

all Territories and possessions of the United States, except the Virgin Islands, the Canal Zone, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, and the island of Guam. (19 U.S.C. 1709(a))

Hence, smuggling into those named areas is not within the terms of the Anti-Smuggling Act. That is appropriate, inasmuch as all of them are outside the U.S. customs area, and most have no local customs duties. (The Virgin Islands imposes very limited local customs duties.) The list of exempt areas should now be expanded, however, to include the Northern Marianas also, because it too is outside the U.S. customs area. The staff of the Northern Marianas Commission on Federal Laws correctly pointed out that

On termination of the trusteeship, the Northern Mariana Islands will become a "Territory or possession of the United States" and, thus, will become part of the United States for purposes of [the Anti-Smuggling Act] (since it is not among the enumerated excluded Territories and possessions). (Report, Documentary Supplement, p. 381)

The Commission staff thus recommended (but the Commission disbanded before it could act upon the recommendation) that the Northern Marianas "be treated as are American Samoa and nearby Guam" and therefore that 19 U.S.C. 1709(a) be expanded to list it. That recommendation is repeated here.

(b) The Trade Fair Program (19 U.S.C. 1751-1756), derived from the Trade Fair Act of 1959, provides for the special treatment of articles "imported or brought into the United States" (19 U.S.C. 1752) for trade fairs or expositions that are designated by the Secretary of Commerce as in the public interest. Such articles may then enter free of duty or free of internal-revenue taxes. The term "United States" is undefined, but for purposes of the customs duty exemption it would necessarily mean the U.S. customs area. That in turn means that if the definition of "United States" for purposes of the Federal tax exemption were to turn on the application of the Federal tax laws, articles brought into a territory for a trade fair would not be tax free. Some Federal internal revenue taxes apply in the territories. The matter does not appear to be of sufficient consequence, however, to warrant amendment. A U.S. designated trade fair in a territory seems unlikely at this time, but if it were to come to pass, the internal revenue taxes that would apply would almost certainly constitute an insignificant consideration.

(c) The chapter entitled Trade Expansion Program (19 U.S.C. 1801-1882) contains what remains of the Trade Expansion Act of 1962, most of which has either been repealed or become obsolete. Two sections that remain are, however, of interest to the territories. Section 232 of the Act (19 U.S.C. 1862) provides a procedure by which the President may "adjust"

(i.e., reduce or prohibit) the importation "into the United States" of an article, if the importation of the article threatens "to impair the national security." More particularly, upon appropriate request, the Secretary of Commerce is required to investigate the effects on the national security of imports of the article and report to the President; and if the Secretary finds that the imports of the article "into the United States" do "threaten to impair the national security," then the President may act to eliminate the threat. The term "United States" is undefined, and as these memoranda on Title 19 demonstrate, usually when it is used in Title 19 it means only the U.S. customs territory. But the term has been more expansively construed so as to include the territories for purposes of 19 U.S.C. 1862, in light of the national security motive that underlies the section. For example, Presidential Proclamation 5141 of December 22, 1983, pertaining to petroleum imports (48 Fed. Reg. 56929, set out as a note following 19 U.S.C. 1862), which recites that it is based upon, among other things, section 232 of the 1962 Act (19 U.S.C. 1862), provides in section 3(a):

No crude oil produced in Libya may be imported into the United States, its territories or possessions.

The construction of "United States" to include the territories for purposes of this national-security import-restriction program, while not unarguable, appears justified. The United States is, of course, responsible for the national defense and foreign affairs as they relate to the territories--matters expressly covered by section 104 of the Northern Marianas Covenant. The staff comments to the Northern Marianas Federal Laws Commission contain the following rationale (edited slightly to fit the current context):

Presidential authority under the Trade Expansion Act of 1962 is sufficiently broad to overcome the presumption that the "United States" does not include the territories. A presidential proclamation restricting particular imports into the Northern Marianas, or

any other territory, pursuant to 19 U.S.C. 1862, if challenged, would almost certainly be upheld for two reasons. First, the President has wide latitude in determining what action to take under the Act and the action selected is supported by a general presumption of validity. Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 561-71 (1976); Pancoastal Petroleum, Ltd. v. Udall, 348 F.2d 805, 807 (D.C. Cir. 1965). Second, import quotas established pursuant to the Trade Expansion Act of 1962 are closely related to the conduct of foreign affairs and the national defense, both areas in which the United States exercises complete authority for the territories. (Report, Documentary Supplement, p. 383.)

The staff recommendation to the Northern Marianas Commission proceeds to conclude that Presidential Proclamation 5141 of December 22, 1983, on imports of crude oil from Libya, referred to above, and certain related proclamations, do not prohibit the importation of Libyan crude oil into the Northern Marianas because they were issued after the effective date of section 502(a)(2) of the Northern Marianas Covenant. After stating that Proclamation 5141 bars the importation of such crude oil into U.S. "territories or possessions," the Staff proceeds to say:

Although Guam is a territory or possession of the United States, the proclamations were issued after January 9, 1978, the effective date of section 502(a)(2) of the Covenant, and are thus not made applicable to the Northern Mariana Islands by operation of that section. Accordingly, the presidential proclamations do not bar the importation of Libyan crude oil into

the Northern Mariana Islands. (Report
Documentary Supplement, pp. 383-384.)

It is not necessary, however, to rely upon section 502(a)(2) of the Covenant to conclude that the Northern Marianas is a "territory or possession" for purposes of Proclamation 5141, and others issued under 19 U.S.C. 1862. Section 105 of the Covenant supports the inclusion of the Northern Marianas because the prohibition in the Proclamation applies "to the several States" as well as to the territories. Accordingly, it is concluded here that Proclamation 5141 and related proclamations do apply to the Northern Marianas. (The Northern Marianas Commission disbanded before it had an opportunity to consider the recommendation of its Staff on this subject. It is for that reason that the memorandum above-quoted is to be found in the Documentary Supplement to the Commission's 1985 Report.)

The second section of the Trade Expansion Act of 1962 that is pertinent to the territories was added in 1985 and appears at 19 U.S.C. 1864. That section provides that any "person" who violates a national security export control imposed under 50 U.S.C. App. 2404

may be subject to such controls on the importing of goods or technology into the United States as the President may prescribe.

The "United States" remains undefined, so the question arises as to whether imports by a "person" into one of the territories are subject to control under the section (19 U.S.C. 1864(a)), if such person has violated a national security export control imposed under 50 U.S.C. App. 2402. The answer is yes, because 50 U.S.C. App. 2404 is the Export Administration Act, and it applies to all of the territories (see Memorandum No. 50-2(p)). Hence, the "United States" for purposes of both 19 U.S.C. 1862 and 1864 includes the territories, as it also does for purposes of the Export Administration Act (50 U.S.C. App. 2415(7)).

(d) Automotive Products (19 U.S.C. 2001-2033) relates to the reduction or elimination of U.S. customs duties on automotive products. It is irrelevant to the territories, because U.S. duties are not collected on products imported into them.

(e) Visual and Auditory Materials of Educational Scientific, and Cultural Character (19 U.S.C. 2051-2052) refers to the duty-free entry of such materials by governments that are parties to a 1949 international agreement on that subject. In proclaiming the U.S. ratification of the agreement in 1966, the President stated that it would be

observed and fulfilled with good faith by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof. (17 U.S.C. 1603)

As a result, foreign materials that qualify are exempt from all duties as they enter the United States and its territories; and materials developed by persons in the territories, if the United States Information Agency certifies that the materials qualify for such treatment, may enter free of duty into such foreign countries as are parties to the agreement. As to the first of these results, the Staff of the Northern Marianas Commission states the following:

Even though the Northern Islands is outside the customs territory of the United States, the Northern Mariana Islands may not levy duties, impose quotas, or require licenses of materials qualified for exemption under the Agreement. (The power of the Northern Mariana Islands, under section 603(b) of the Covenant, to levy duties on foreign goods is specifically qualified by the requirement that any such duties be levied "in a manner consistent with the

international obligations of the United States." The Agreement, of course, is such an international obligation.) (Report, Documentary Supplement, p. 385.)

(f) The chapter entitled Customs Service (19 U.S.C. 2071-2081) contains laws for the internal operation of the agency, and because, as to the territories, the Customs Service operates only in the Virgin Islands (where it is required to do so by 48 U.S.C. 1395, 1406i), the chapter is largely irrelevant for current purposes. The Customs Service collects local duties in the Virgin Islands. Nothing in this chapter, or elsewhere, however, would foreclose the Customs Service from conducting operations in the territories generally, because the Service has numerous responsibilities beyond the collection of U.S. customs duties (for example, with respect to the importation of narcotics and dangerous drugs under the Controlled Substances Import and Export Act, 21 U.S.C. 951-970, Memorandum No. 21-6). The Customs Service is expressly authorized to acquire buildings or lease space in "the territories and possessions" for purposes of approved undercover investigative operations (19 U.S.C. 2081).

(g) The Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals (19 U.S.C. 2091-2095) prohibits the importation into the "United States" of certain pre-Columbian stone carvings and wall art. The "United States" is defined to include only the U.S. customs territory (19 U.S.C. 2095(2)), so the prohibition does not apply to such imports into the territories.

(h) The Trade Act of 1974 (19 U.S.C. 2101-2495) is long and rather complex, but because it deals for the most part with U.S. customs duties and their modification, and because the territories are outside the U.S. customs territory, it can be given summary treatment here. The Act is concerned with the negotiation of international agreements to adjust tariffs and eliminate trade barriers (19 U.S.C. 2111-2241), with the enforcement of U.S. rights under trade agreements and the U.S. response to foreign trade practices (19 U.S.C. 2411-2416), with trade relations with "nonmarket

economy countries" (principally Communist countries) (19 U.S.C. 2431-2441), with duty-free treatment for eligible articles from a "beneficiary developing country" (19 U.S.C. 2461-2466), and with (added in 1986) the treatment under the U.S. tariff laws of products of major drug producing countries and major drug-transit countries (19 U.S.C. 2491-2495). Although the foregoing rarely provide a convenient statement of geographical application--with only the portion pertaining to articles from a beneficiary developing country carrying a reference to the import of such articles "into the customs territory of the United States" (19 U.S.C. 2463(b))--it is clear that they logically cannot have any direct effect upon the territories, owing to the exclusion of the territories from the portions of the U.S. to which U.S. customs duties apply.

Two provisions of the Trade Act of 1974, however, warrant comment. First, the provisions of the Act that permit the "duty-free treatment for any eligible article from any beneficiary developing country" (19 U.S.C. 2461) apply to articles from the Trust Territory, which is defined as a "country" for purposes of the pertinent sections (19 U.S.C. 2462(a)(3)). The matter is largely of academic interest now, with only Palau retaining Trust Territory status, and with that status being unlikely long to continue. Imports from the former Trust Territory components of the Federated States of Micronesia and the Marshalls are now governed by the Compact of Free Association Act of 1985.

Second, one portion of the Trade Act of 1974 that is not referred to above (Title II, 19 U.S.C. 2251-2395) provides various forms of relief from injury caused by import competition. The relief can take the form of Presidential action imposing or raising duties, financial and other assistance to workers who are adversely affected by competing foreign imports, loans and loan guarantees to firms injured by foreign competition, and loan guarantees to affected communities. In the case of only one of these four forms of relief does the law explicitly not apply to the territories (i.e., that which pertains to assistance to workers, where the definition provided at 19 U.S.C. 2319(8) excludes the territories). (But Commerce Department regulations exclude the territories from the business firm and community

assistance provisions (13 CFR 315.2(a)(6), (b)(7)).) None of these kinds of relief, however, could logically be construed to apply to the territories, given their status outside the U.S. customs territory, and the Congress doubtless intended that they therefore be excluded.

But one section pertaining to relief from injury caused by import competition requires further comment. Before the President can impose or raise duties so as to provide import relief, an investigation must be conducted by the International Trade Commission to determine

whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury . . . to the domestic industry. . . (19 U.S.C. 2251(b)(1)).

In 1983, in the Caribbean Basin Economic Recovery Act (Pub. L. 98-573, discussed below at (k)), Congress provided that for purposes of that section (19 U.S.C. 2251(b)(1)), and for purposes generally of the relief provisions of the Trade Act of 1974,

the term "industry" shall include producers located in the United States insular possessions. (Note following 19 U.S.C. 2251.)

This definition means that in reaching a determination as to whether "the domestic industry" is being injured by increased foreign imports, so as to permit new or increased duties, the International Trade Commission must take into account the segments of that industry in the territories. The provision was intended, as explained in the House Committee report on the legislation, "to maintain the competitive position of . . . the U.S. insular possessions which might otherwise be adversely affected by the Caribbean Basin Initiative" (1983 U.S. Code Cong. and Admin. News 663). Whether the inclusion of the territories for the purpose of International Trade

Commission determinations under 19 U.S.C. 2251(b)(1) has been significant to them is doubtful, but the motive is obviously commendable. For this reason, the Staff of the Northern Marianas Commission on Federal Laws recommended the amendment of the definition of "industry" for purposes of 19 U.S.C. 2251(b)(1) to include expressly the Northern Marianas (Report, Documentary Supplement, pp. 391, 394). But that is not necessary. While section 502(a)(2) of the Covenant would not operate to make the definition applicable to the Northern Marianas, since the definition was enacted after the January 1978 effective date of section 502, section 105 of the Covenant causes the definition to include the Northern Marianas now--because the definition is, as section 105 provides, also "applicable to the several states."^{1/}

(i) The Trade Agreements Act of 1979 (19 U.S.C. 2501-2581) deals with three subjects, of which the first two are irrelevant to and inapplicable to the territories. These two are the provisions concerning the approval of various international trade agreements (19 U.S.C. 2503-2504), which relate to imports into the U.S. customs territory; and the provisions authorizing the modification of Federal procurement practices (19 U.S.C. 2511-2518), in order to encourage reciprocity with major industrialized countries in the areas of Government procurement.

The third subject, however, involves the prohibition of "technical barriers to trade" that take the form of product standards that "create unnecessary obstacles to the foreign commerce of the United States" (19 U.S.C. 2531). The

^{1/} From the Staff memorandum on this subject to the Northern Marianas Commission, it appears that the Staff believed its recommended amendment was needed in part because the legislative history of the Caribbean Basin Economic Recovery Act did not list the Northern Marianas as among the "possessions" that would benefit from the expanded definition of "industry" (Report Documentary Supplement, p. 390). But the list of "possessions" there provided is not intended to be exhaustive, listing only some that the term would "include" (1983 U.S. Code Cong. and Admin. News 663). Although not so listed, the Northern Marianas would also be among those "included," in light of section 105 of the Covenant.

territories are affected. These provisions, contained in Title IV of the Trade Agreements Act of 1979 (19 U.S.C. 2531-2573) are intended to discourage a private person, a Federal agency, or a "State" agency from engaging in "standards-related activities" that create obstacles to U.S. foreign commerce--unless the activities are directed to approved domestic objectives such as the protection of health or safety. A "private person" is a citizen or national of the United States (19 U.S.C. 2571(9)), and "State" includes the Virgin Islands, Samoa, Guam, "and any other Commonwealth, territory, or possession of the United States" (19 U.S.C. 2571(15)). The provisions against standards-related activities that obstruct commerce thus apply to the people of all of the territories, and to the agencies of all of them, including the Northern Marianas--the latter under section 105 of the Northern Marianas Covenant.^{2/}

(j) The chapter entitled Convention on Cultural Property (19 U.S.C. 2601-2613) implements the international convention on that subject, and permits the President to restrict imports of objects of archeological or ethnological interest if a foreign state that is a party to the convention so requests--and if, as elegantly stated in the law, "the cultural patrimony of the State Party is in jeopardy from the pillage of archeological or ethnological materials of the State Party" (19 U.S.C. 2602(a)(1)(A)). When the President takes action under this law, imports are restricted "into the United States" (19 U.S.C. 2606(a)), with the "United States" defined to include "any territory or area the foreign relations for which the United States is responsible" (19 U.S.C. 2601(10)). Hence, imports into the Virgin Islands, Guam, Samoa, and the Northern Marianas are all covered by this law because the U.S. is responsible for the foreign relations of them all. Enforcement in the U.S. customs territory and in

^{2/} This result is consistent with the conclusion of the Staff of the Northern Marianas Federal Laws Commission, which pointed out that the 1979 Act was enacted too late to be extended to the Northern Marianas under section 502(a)(2) of the Covenant, but that following trusteeship termination (which occurred on November 3, 1986, as to the Northern Marianas), the Northern Marianas would constitute a "State" for purposes of 19 U.S.C. 2571(15). (Report, Documentary Supplement, p. 392.)

the Virgin Islands is performed by Federal customs officers, and elsewhere "by such persons as may be designated by the President" (19 U.S.C. 2613).

(k) The Caribbean Basin Economic Recovery Act (19 U.S.C. 2701-2706), enacted in 1983, authorizes the duty-free entry into the United States customs area of certain eligible articles imported from Presidentially-designated countries and foreign territories in the Caribbean. As such, it would not affect the importation into the U.S. territories of any such articles, but the Act has indirect consequences for the territories and makes certain provisions for them. Most importantly, the Act provides for the amendment of Headnote 3(a) of the Tariff Schedules of the United States to state that

articles which are imported from insular possessions of the United States shall receive duty treatment no less favorable than the treatment afforded such articles when they are imported from a beneficiary country under [the Caribbean Basin Economic Recovery Act]. (General Note 3(a)(iv).)

In addition, in defining articles from the Caribbean that are eligible for duty-free treatment, the Act provides that at least 35% of the value of the articles must be attributable to materials produced in the beneficiary country (or foreign territory) plus costs of processing (19 U.S.C. 2703(a)(1)(B)), but adds that the term "beneficiary country" for this purpose includes Puerto Rico and the Virgin Islands--thereby permitting materials produced in those U.S. areas to be included within the 35% calculation. Further, in the section of the Act that requires annual reports by the International Trade Commission on the economic impact of the Act on U.S. industries and consumers, industries "in the insular possessions of the United States shall be considered to be United States industries" (19 U.S.C. 2704(a)). The term "possessions" in that section, as well as in Headnote 3(a) quoted above, includes all of the territories. In the case of the Northern Marianas, it does so for purposes of the Headnote

in light of section 603(c) of the Covenant, which provides that imports into the customs territory of the U.S. from the Northern Marianas will be accorded the same treatment as imports from Guam; for purposes of 19 U.S.C. 2704(a), the term includes the Northern Marianas in light of section 105 of the Covenant, which provides for the application to the Northern Marianas of laws "applicable to the several States," and this section is so applicable.

(l) The chapter entitled Wine Trade (19 U.S.C. 2801-2806) contains the Wine Equity and Export Expansion Act of 1984, the purpose of which is to improve the competitive position of U.S. wines in foreign markets. "United States wine" means wine produced within the U.S. customs territory only (19 U.S.C. 2802(6)), but since no territory has yet become a wine producer, they are not injured by their exclusion.

(m) The United States-Canada Free-Trade Agreement Implementation Act of 1988 (P.L. 100-449, approved September 28, 1988) has not yet been codified and the Agreement is not yet in effect, but it is mentioned here because the territories have expressed concern about it. Products of the territories are not included in the tariff provisions of the Agreement (Title II, see section 202(f)(7)(B))--one of the purposes of which is "to establish a free-trade area between the two nations through the reduction or elimination of barriers to trade in goods and services and investment" (sec. 2). Because the territories are outside of the U.S. customs territory, their products could not logically be included in the Agreement. In addition, Canada's own rules of origin would foreclose duty-free entry into Canada of most territorial products that now enter the U.S. duty-free. The U.S. Government, through the Department of the Interior, has assured the territories that it will attempt to gain preferred access to Canada for territorial products. The nontariff parts of the Agreement, however, which pertain to services and investments, are applicable to the territories (see sec. 304).

Conclusion: The foregoing laws pertaining to customs do not require modification to accommodate the needs of the

territories, except for the Anti-Smuggling Act ((a) above), which should be amended to accord to the Northern Marianas the same treatment now accorded to the other territories.

Federal agency comments: Comments were requested from the Department of the Treasury and the Department of Justice. All comments received have been reflected above.

Title 20 - EDUCATION

- Contains nothing of substantial interest to the territories.
- * Contains matters of particular interest to the territories, but no legislative recommendations.
- ** Contains recommendations for changes in the law.
- (**) Contains recommendations for changes in the law, but the need for them is not urgent.

<u>Memorandum Number</u>	<u>Subject</u>	<u>20 U.S.C. sections</u>
	Prefatory Comment on 48 U.S.C. 1469a	
20-1	- (a) Teaching of Agricultural, Trade, Home Economics, and Industrial Subjects	11-28
	* (b) Smithsonian Institution, National Museums and Art Galleries	41-80p
	- (c) National Zoological Park	81-85
	- (d) Government Collections and Institutions for Research, and Material for Educational Institutions	91-92
	* (e) American Printing House for the Blind	101-106
	(f) Vending Facilities for Blind in Federal Buildings	107-107f
	* (g) Instruction as to Nature and Effect of Alcoholic Drinks and Narcotics	111-113
	- (h) Howard University	121-130aa-5
	- (i) National Arboretum	191-195
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	* Financial Assistance to Local Educational Agencies	236-246
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	(**) (d) Pay and Personnel Program for Overseas Teachers	901-907
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	- (d) National Commission on Libraries and Information Science	1501-1506
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	- (f) Discrimination Based on Sex or Blindness	1681-1686
	- (g) Equal Educational Opportunities and Transportation of Students	1701-1758
	- (h) Harry S. Truman Memorial Scholarships	2001-2013
	- (i) American Folklife Preservation	2101-2107
20-6	* (a) Vocational Education	2301-2471
	- (b) Career Education and Career Development	2501-2569
	** (c) Strengthening and Improvement of Elementary and Secondary Schools	2701-3386
	- (d) Department of Education	3401-3510
	- (e) Asbestos School Hazard Detection and Control	3601-3611
	- (f) National Center for the Study of Afro-American History and Culture	3701-3703
	* (g) Education for Economic Security	3901-4074
	- (h) Education of the Deaf	4301-4362

Title 20
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- (i) American Indian, Alaska Native, and Native Hawaiian Culture and Art Development 4401-4451
- (j) James Madison Memorial Fellowship Program 4501-4517
- (k) Barry Goldwater Scholarship and Excellence in Education Program 4701-4711
- (**) (l) Fund for the Improvement and Reform of Schools and Teaching 4801-4843
- (m) Education for Native Hawaiians 4901-4909

November 1988

Prefatory Comment - Title 20

In 1977 Congress enacted an unusual and helpful authorization that permits grant consolidation by Federal departments for "Insular Areas," defined to include the Virgin Islands, Guam, Samoa, and the Northern Marianas. Under that law, which is section 501 of Public Law 95-134, as amended (48 U.S.C. 1469a), a Federal department or agency that administers a law or laws providing for grants to these areas may consolidate all such grants--if the territory seeks consolidation--and the territory may determine how the consolidated grant will be allocated among the programs for which the components of the consolidated grant are authorized. Additionally, the law provides that a territory need submit only one application for a consolidated grant, and it need submit only a single report on how the grant was spent. The Federal department or agency is further authorized to waive any requirement for the local matching of the Federal grant.

The major effects of the foregoing are: (1) to permit the territory to decide to which of its programs the Federal financial assistance will be directed--so that programs that constitute areas of major importance to the territory can receive more support than the statutory formula for that particular program would permit, while programs of less relevance to the territory can receive lesser funding, or none at all; (2) to reduce substantially the paperwork burden usually associated with obtaining Federal grants, including particularly the elimination of the elaborate "State plan" that is customarily required as a prerequisite for a Federal grant--substituting instead the territory's single application for a consolidated grant; and (3) to eliminate, at least potentially, the statutory requirement for local matching.

The Department of Education has taken particular advantage of the grant consolidation authority. Its regulations on the subject, set forth at 34 CFR 76.125-76.137, list 25 Federal grant programs of that Department that are available for consolidation (and the Department reports informally that the list is being revised to reflect 1988 legislation). The regulations are a model of simplicity, permitting maximum flexibility to the territory in allocating Federal funds, and requiring minimum paperwork in achieving and later reporting on the consolidated grant. All requirements for matching are waived for Department of Education programs that are consolidated.

The grant consolidation authority is important to Federal departments and agencies, and to the territories, in part because it provides an administrative mechanism for overcoming statutory problems that might otherwise require legislative correction--such as requirements for burdensome bureaucratic machinery at the territorial level, for matching that may be difficult or impossible for the territory to produce, for elaborate plans the preparation of which could consume too much of the territory's resources. It has been the practice in this study to refrain from recommending legislative change in a given statute, if the result to be achieved could be accomplished instead by administrative action. Federal grant laws often impose requirements upon the grantee that are unduly burdensome for small territories; and they often require the allocation of funds that do not reflect the territories particular needs. The authority at 48 U.S.C. 1469a can often be used to overcome these problems, thereby avoiding the need for further legislation.

- Subject:
- (a) Teaching of Agricultural, Trade, Home Economics, and Industrial Subjects
Title 20, Chapter 2 (20 U.S.C. 11-28)
 - (b) Smithsonian Institution, National Museums and Art Galleries
Title 20, Chapter 3 (20 U.S.C. 41-80p)
 - (c) National Zoological Park
Title 20, Chapter 4 (20 U.S.C. 81-85)
 - (d) Government Collections and Institutions for Research, and Material for Educational Institutions
Title 20, Chapter 5 (20 U.S.C. 91-92)
 - (e) American Printing House for the Blind
Title 20, Chapter 6 (20 U.S.C. 101-106)
 - (f) Vending Facilities for Blind in Federal Buildings
Title 20, Chapter 6A (20 U.S.C. 107-107f)
 - (g) Instruction as to Nature and Effect of Alcoholic Drinks and Narcotics
Title 20, Chapter 7 (20 U.S.C. § 111-113)
 - (h) Howard University
Title 20, Chapter 8 (20 U.S.C. 121-130aa-5)
 - (i) National Arboretum
Title 20, Chapter 11 (20 U.S.C. 191-195)
 - (j) Foreign and Exchange Students
Title 20, Chapter 12 (20 U.S.C. 221-225)

Comment: The several chapters of Title 20 that are discussed herein are for the most part irrelevant to the territories. A few contain matters of slight interest, but none warrants legislative attention.

Discussion: (a) The chapter entitled Teaching of Agricultural, Trade, Home Economics, and Industrial Subjects (20 U.S.C. 11-28) contained the Vocational Education Act of 1917, commonly referred to as the Smith-Hughes Act, as amended and

supplemented. It provided grants for the training of teachers in vocational subjects, and it had been extended to the Virgin Islands and Guam. Much of the chapter was repealed by enactment in 1963 of new vocational education legislation (considered in its current form in Memorandum No. 20-6(a)), and that which remains in this Chapter 2 has been in effect superseded. Accordingly, although the unrepealed sections that remain are themselves confined in their impact to the "States" (e.g., 20 U.S.C. 11-14),--the territorial extensions having been repealed in 1963 (formerly 20 U.S.C. 31-34)--the territories are sufficiently comprehended by the current Vocational Education Act.

(b) Smithsonian Institution, National Museums and Art Galleries (20 U.S.C. 41-80p) provides for the creation of a large number of educational and cultural institutions, all in the District of Columbia (except for a Biological Area set aside in the Canal Zone, 20 U.S.C. 79-79e). A possibly unduly careful reading results in the discovery of a few exclusionary features: cooperation by the Smithsonian runs to the "States" (20 U.S.C. 42, 69, 70); only "citizens" may serve on certain of the governing boards (20 U.S.C. 72(a), 76h(a), 77(a)); and the basic function of the Smithsonian is to serve "the increase and diffusion of knowledge among men" (20 U.S.C. 41). But it would doubtless be picky to dwell upon these points. It is unlikely that any territorial person would be inconvenienced by them.

(c) The National Zoological Park (20 U.S.C. 81-85) was created in 1890. Its charter contains no features that could be troublesome to the territories or their people.

(d) Government Collections and Institutions for Research, and Material for Educational Institutions (20 U.S.C. 91-92) permits research in "governmental collections" in Washington by "duly qualified individuals, students and graduates of any institution of learning in the several States and Territories"--a phrase that surely includes the territories under this 1892 law; and permits admission to a Florida biological station to teachers and students at land-grant colleges. Each of the territories has an institution with the status of a land-grant college.

(e) The American Printing House for the Blind (20 U.S.C. 101-106), located in Louisville, Kentucky, is funded under this chapter, and its trustees are required to distribute annually books and instructional materials for the education of the blind to institutions "in the States, territories, and possessions." The distribution is by a formula, based on the ratio of blind students in the State, territory, or possession and the number of blind students nationally (20 U.S.C. 102(1)(A)).

(f) The chapter entitled Vending Facilities for Blind in Federal Buildings (20 U.S.C. 107-107f) provides authority for licensed blind persons to operate such facilities on Federal property. The law places substantial authority in cooperating "State" agencies, with the term "State" being defined to include the territories and possessions (20 U.S.C. 107e(5)). The territories are thus all comprehended by this 1936 law. The beneficiaries of the law are "blind persons who are citizens of the United States" (20 U.S.C. 107a(a)(5)), but because there is not now any Federal building, or indeed any Federally-owned property, in American Samoa, there appears to be no need to expand that reference to include a non-citizen national in Samoa.

(g) Instruction as to Nature and Effect of Alcoholic Drinks and Narcotics (20 U.S.C. 111-113) is required to be taught "thoroughly . . . by the use of textbooks in the hands of pupils" in public schools

throughout the Territories, in the Military and Naval Academies of the United States, and in the District of Columbia, and in all Indian and colored schools in the Territories of the United States. (20 U.S.C. 111).

This 1886 law, consisting of three short sections, also requires that teachers' certificates be granted to persons to teach "in the public schools of the District of Columbia or

Territories" only if they have satisfactorily passed an examination in this subject.

The Guam Commission on Federal Laws concluded in 1951 that this law, described by its staff as "a meddlesome piece of legislation," applied only to incorporated territories, and thus not to Guam (H. Doc. No. 212, 82d Cong., p. 30); and in unpublished research, the staff of the Northern Marianas Commission in 1985 reached the same result as to the Northern Marianas. (The Virgin Islands Commission overlooked this law in its 1956 report.) The conclusion is convenient, but not unarguable, in light of Puerto Rico v. Shell Co. (302 U.S. 253 (1937)), and the fact that the quoted language shows a Congressional intent to reach all schools for which it then had the Constitutional power to legislate.

Nevertheless, there seems no real need for the Congress to act to declare this law inapplicable to the present territories (if, indeed, the Congress were minded to take such a position, which is itself by no means certain). The language of the portion of the law above quoted suggests that it is probably obsolete, and its application to a territory is, in any event, unlikely ever to be tested--no litigation having arisen under it during its century of life. This sleeping dog thus can be permitted to continue to lie.

(h) The chapter titled Howard University (20 U.S.C. 121-130aa-5) concerns Federal financial assistance to that institution, and is not pertinent to the territories.

(i) The chapter titled National Arboretum (20 U.S.C. 191-195) authorizes the Secretary of Agriculture to establish the arboretum, and is not pertinent to the territories.

(j) Foreign and Exchange Students (20 U.S.C. 221-225) relates to the instruction at institutions of the U.S. Government of citizens of the American republics and of Iran. It contains nothing pertinent to the territories.

Conclusion: The chapters of Title 20 discussed herein require no change to meet the needs of the territories.

Federal agency comments: Comments were requested from the Departments of Education and Justice. All comments received have been reflected above.

Memorandum No. 20-2
January 1988
Revised November 1988

Subject: Financial Assistance to Local Educational Agencies
Title 20, Chapter 13 (20 U.S.C. 236-246)

Purpose: To provide Federal financial assistance to local school districts for the maintenance and operation of public elementary and secondary schools in areas affected by Federal activities.

Territorial application: The Act applies fully to all of the territories.

Recommendation: The Act requires no modification to meet the needs of the territories.

Discussion: The 1950 law contained in Chapter 13 of Title 20 is of immense importance to Guam, and potentially (but not currently) to the other territories as well. Its official popular name is the Educational Agencies Financial Aid Act, but it is more commonly known as Public Law 874 (of the 81st Congress), or as the Federal Impact Aid Act.

The function of the Act is to compensate local school districts when they experience a financial burden due to any of four circumstances:

- reduced tax revenues as a result of Federal acquisition of real property,
- increased costs as a result of providing education for children residing on Federal property,
- increased costs as a result of providing education for children whose parents are employed on Federal property, and

-- a sudden and substantial increase in school attendance as a result of Federal activities. (20 U.S.C. 236.)

Local educational agencies that qualify under the statutory criteria receive Federal grants, based on complex formulae that need not to be detailed here (20 U.S.C. 237, 238, 239). (The Department of Education points out, however, that section 4 of the Impact Aid Act (20 U.S.C. 239), which authorizes financial assistance for sudden and substantial increases in school attendance as a result of Federal activities, has not been funded in recent years.) The Act applies to the territories, with the term "State" being defined expressly to include the Virgin Islands, Guam, American Samoa, and the Northern Marianas (20 U.S.C. 244(8)). (The Act has kept up with changing times: until November 1, 1978, it referred to the Trust Territory, but Public Law 95-561 of that date deleted the reference to the Trust Territory and added the Northern Marianas.)

Each formula for the distribution of Federal funds accords to the territories the same treatment as the States--with one material exception. An ingredient of the formula for entitlement to Federal funds based on children of persons who reside or work on Federal property is a "local contribution rate" based on school districts within the State or territory that are "generally comparable" to the school district of the local educational agency for which the computation is being made (20 U.S.C. 238(d)(3)(A)). In recognition of the fact that in the territories there is only one school district, it is obviously not possible to determine a local contribution rate that takes into account "generally comparable" school districts in the pertinent territory. Accordingly, the Secretary of Education is to establish the local contribution rate in the case of the Virgin Islands, Guam, Samoa, and the Northern Marianas (as well as in the case of "any State in which there is only one local education agency") (20 U.S.C. 238(d)(3)(B)(iii)). But the Secretary must do so in accordance with policies and principles which will best achieve the purposes of this section and which are consistent with the policies and principles provided in this paragraph for determining local contribution rates in States where it is

possible to determine generally comparable school districts.
(20 U.S.C. 238(d)(B)(iii).)

In the circumstances, the treatment of the territories is fair. The territories are also authorized to participate in receiving Federal financial aid as a result of a natural disaster (20 U.S.C. 241-1).

The Secretary of Education may make arrangements in the territories, and elsewhere, for the free, public education of children who reside on Federal property, if State (or territorial) tax revenues cannot be used for such education, or if the local educational agency is not providing "suitable free public education" for them (20 U.S.C. 241(a)). In the territories, the education provided such children may extend as well to the children of Federal employees (20 U.S.C. 241(c)). No action under the section has been taken in any of the territories, but the Department of Education reports that in September 1988 the Government of Guam was negotiating for funding from the Department of Defense under this provision.^{1/}

A provision of the Act to encourage "equalization" plans--i.e., plans to achieve equality of educational opportunity throughout the State--does not (or did not) apply to the territories (20 U.S.C. 246(c)(2)). But that did them no disservice, given the single educational agencies of the territories, and beyond that, the authorization has effectively expired.

The Federal Impact Aid Act formerly contained provisions concerning financial assistance to local educational agencies for the education of Indian children (formerly 20 U.S.C. 241aa-241ff). These provisions, as amended by Public Law

^{1/} Footnote added in 1993: Press reports, confirmed by the Department of Defense, indicate that Defense has provided grants to the Government of Guam for public education in the range of \$10 million annually, for each year beginning in 1988 through fiscal year 1993.

100-297 of April 28, 1988, have been recodified at Title 25, section 2601, et seq. They are not further considered in this study, as being irrelevant to the territories.

Conclusion: The Educational Agencies Financial Aid Act applies fully to all of the territories, and presents no problems to them that require legislative attention.

Federal agency comments: Comments were received from the Department of Education and the Department of Justice. All comments received have been reflected above.

Memorandum No. 20-3
March 1988
Revised November 1988

- Subject:
- (a) Public Library Services and Construction
Title 20, Chapter 16 (20 U.S.C. 351-375)
 - (b) School Construction in Areas Affected by Federal Activities
Title 20, Chapter 19 (20 U.S.C. 631-647)
 - (c) Training and Fellowship Programs for Community Development
Title 20, Chapter 23 (20 U.S.C. 801-807)
 - (d) Pay and Personnel Program for Overseas Teachers
Title 20, Chapter 25 (20 U.S.C. 901-907)
 - (e) Overseas Defense Dependents' Education
(Title 20, Chapter 25A (20 U.S.C. 921-932)
 - (f) Support and Scholarship in Humanities and Arts; Museum Services
Title 20, Chapter 26 (20 U.S.C. 951-968)
 - (g) Indemnity for Exhibitions of Arts and Artifacts
Title 20, Chapter 26A (20 U.S.C. 971-977)

Comment: The laws considered herein apply to the territories, or otherwise make suitable provision for them--with the exception of those pertaining to Defense Department schools ((d) and (e) below). They ought to be amended to accord to the Northern Marianas the same treatment as the States and other territories receive, but they present no current problem and their amendment is nonurgent.

Discussion: (a) The chapter headed Public Library Services and Construction (20 U.S.C. 351-375) contains the Library Services and Construction Act, initially enacted in 1956. The Act authorizes grants for various library purposes, and it applies fully to the territories--defining them all by name as "States" (20 U.S.C. 351a(7))--and making careful provision for them.

Three State-administered grants are provided under Titles I, II, and III of the Act, with a long range program, a basic "State" plan, approved by the Secretary of Education, and a State annual program (20 U.S.C. 351d) as prerequisites for award. There is a requirement for local financial participation under Titles I and II, but for the Title III grants the Federal share is 100% for all entities. The territories are entitled to Federal financial participation at the level of a stipulated 66%, which is the maximum that a State could achieve (20 U.S.C. 351e(b)). (The States' participation level is based on per capita income, and could be as low as 33%.) The Trust Territory was allowed a 100% Federal participation (20 U.S.C. 351e(b)), but that either is or will probably soon become a matter of history only.

The three principal grants are for (1) the extension of public library services (20 U.S.C. 352), (2) public library construction (20 U.S.C. 355a), and (3) interlibrary cooperation and resource sharing (20 U.S.C. 355e). In each instance a minimum grant for each State is stipulated, with a lesser minimum in each case for each of the territories. Thus, for extension of public library services, the State minimum is \$200,000, while each territory is \$40,000; for library construction, the figures are \$100,000 and \$20,000; and for interlibrary cooperation, \$40,000 and \$10,000 (20 U.S.C. 351c(a)). It will be observed that if population is the standard, the territories' minima are generous.

The Act provides for two much smaller programs that are available to the territories, with grants awarded competitively, but the maximum awards are low. These are grants for the acquisition of foreign language materials, with a maximum grant of \$15,000 (20 U.S.C. 371); and grants for library literacy programs, with a maximum grant of \$25,000 (20 U.S.C. 375). Although the statute permits awards of these grants to the territories, the competitive process--when used in the award of Federal grants generally--often results in their exclusion.

One shortcoming does appear, but it is so minor as to permit overlooking. At 20 U.S.C. 351d(f), a State or territory that

disputes the action of the Secretary of Education with respect to the approval of its plan must be afforded an administrative hearing, after which it may seek review in the circuit of the United States Court of Appeals in which it is located. Samoa is located in none, but we may safely assume that the Government of Samoa is unlikely to be disposed to argue the matter.

(b) School Construction in Areas Affected by Federal Activities (20 U.S.C. 631-647) contains the authority by which the Federal Government makes grants to local education agencies for school construction when aid is required for "federally-connected children"--i.e., those who reside on Federal property, and those who reside with parents employed on Federal property. The territories are fully covered by the law, on the same terms as the States, with the Virgin Islands, Guam, Samoa, and the Northern Marianas all being expressly named (20 U.S.C. 645(13)). One provision applies uniquely to the territories, and to certain other off-shore areas. If the local education agency is not able to provide "suitable free public education" for children residing on Federal property in either the States or the territories, the Secretary of Education may arrange for the construction, leasing, or otherwise of buildings needed to provide "the minimum school facilities" for their education (20 U.S.C. 640(a)). (That has not been done in any of the territories.) And if he were to do so in one of the territories, the Secretary is also authorized to provide minimum facilities as well for the children residing with a parent employed (but not resident on) Federal property, but only if certain findings are made, including a finding that "English is not the primary language of instruction in schools in the locality" (20 U.S.C. 640(a)). Such a finding would not be possible in the four territories here involved, in all of which English is the language of instruction in the public schools. That special provision could, thus, as to them be eliminated from the law, and that would be consistent with reality. The Department of Education points out, however, that funds have been made available under this authority (20 U.S.C. 640(a)) in Puerto Rico and Wake Island, both of which are also covered, so the statutory authority should continue.

(c) Training and Fellowship Programs for Community Development (20 U.S.C. 801-807) pertains to a program of grants to the "States" and fellowships for the graduate training of professionals in the fields of city and regional planning, housing, and urban affairs. The program, administered by the Department of Housing and Urban Development, may have ended, but in any event, the term "State" includes the Virgin Islands, Guam, and Samoa (20 U.S.C. 807(a)), and by operation of section 502(a)(2) of the Covenant, the Northern Marianas as well.

(d) Pay and Personnel Program for Overseas Teachers (20 U.S.C. 901-907) pertains to salary, leave, and other personnel matters for teachers in schools in overseas areas that are operated by the Department of Defense for the children of members of the Armed Forces and for the children of civilian employees of the Department of Defense. The schools are those outside the United States, with the United States defined to include the "possessions," but to exclude the Trust Territory (20 U.S.C. 901(3), (4)). The effect, thus, is to make the law inapplicable to the States, the Virgin Islands, Guam, and Samoa (where there are now no Defense Department schools in any event) but to make it applicable to the Trust Territory (and thus, at this time, to Palau). As to the Northern Marianas, it probably now constitutes an "overseas" area for purposes of this law--so that if there were a Defense Department school there (which there is not), its teachers would be covered by the law. This is so because section 502(a)(2) of the Northern Marianas Covenant, which operates to extend certain Federal laws to the Northern Marianas, applies to laws "applicable to Guam," and not to those affording an exemption to Guam, as this one does. The point is academic since there are no Defense Department schools in any of the territories, but equality of treatment obviously suggests that the Northern Marianas ought to be accorded the same treatment as the States, Guam, and the other territories. This could be achieved by adding a reference to the Northern Marianas at 20 U.S.C. 901(4), thereby making it a part of the "United States." It could be argued that the Northern Marianas is already a part of the United States for purposes of this law, in light of section 105 of the Northern Marianas Covenant, but that section does not fit neatly here, because of its reference to laws "applicable." Clarifying language would thus be desirable.

(e) Overseas Defense Dependents' Education (20 U.S.C. 921-932) requires that the Secretary of Defense establish a free public education system, through secondary school, for Defense Department dependents "overseas." The definitions in this law, approved November 1, 1978, parallel those in the personnel law discussed above (at (d)). That is, the Virgin Islands, Guam, and Samoa are all within the "United States," and thus not "overseas," but the Northern Marianas is, in effect, "overseas" (20 U.S.C. 932(3), (4))--so that were there Defense personnel in the Northern Marianas, the Secretary of Defense would be obligated to establish schools for their dependents, or otherwise arrange for their education. Equality of treatment argues for treating the Northern Marianas in the same manner as other U.S. areas, and accordingly a reference to it should be added at 20 U.S.C. 932(4).

(f) The chapter entitled Support and Scholarship in Humanities and Arts; Museum Services (20 U.S.C. 951-968) contains the 1965 Act creating the National Foundation on the Arts and Humanities (20 U.S.C. 951-960), a statutory title that covers three independent Federal agencies: the National Endowment for the Arts, the National Endowment for the Humanities, and the Institute of Museum Services, as well as their related councils.

Each of the Endowments is authorized to provide financial assistance, based on individual applications, to individuals and groups, and each also provides grants to the States, defined to include the territories (20 U.S.C. 952(g)), for programs and projects in the arts and humanities. In general, the grants to States are for 50% of the program or project cost (20 U.S.C. 954(e), 956(f)(1)). The Virgin Islands, Guam, and Samoa were defined as "States" at the outset (1965), with the Northern Marianas being added in 1980 (20 U.S.C. 952(g)). All States, so defined, are entitled to minimum annual grants from each Endowment of \$200,000 (20 U.S.C. 954(g)(3), 956(f)(4)) but--in the only provisions of the Act that treat the territories differently from the States--if the amount appropriated exceeds the minimum required for such payments to "States", the territories do not share in that excess in the same manner as the 50 States. That is the effect of two

provisions whose meaning is somewhat hidden, but which have the effect of restricting the sharing of such excess funds to "States" (including the District of Columbia and Puerto Rico) which have populations in excess of 200,000 (20 U.S.C. 954(g)(4)(E), 956(f)(5)(E)). The provisions appear to be reasonable, but one might hope for greater forthrightness in drafting.

The two Councils on the Arts and on the Humanities exist to give advice to the chairpersons (so termed in the law) of the Endowments, and to review applications for financial assistance. One must be a U.S. citizen to be eligible for appointment to each of the Councils, but the disadvantage to Samoans appears negligible. There is no citizenship requirement for recipients of financial assistance from the Endowments, and clearly no bar to applicants from the territories.

The third agency, the Institute of Museum Services, was created under the Museum Services Act, enacted in 1976 (20 U.S.C. 961-968). That Act provides for Federal financial assistance to a broad range of museums and to professional museum associations "to increase and improve museum services" (20 U.S.C. 965). The General Operating Support program grants (up to 10% of a museum's operating budget of \$75,000) can be used for operational expenses. Conservation Project Support program grants generally do not exceed 50% of the project cost. Professional museum associations may apply for contracts and cooperative agreements with the Institute of Museum Services through the Professional Services Program (20 U.S.C. 965(b)(1)). The Act contains no language providing for its geographical application, but it also contains no language of exclusion. Because the agency (the Institute of Museum Services) is a part of the National Foundation on the Arts and Humanities (20 U.S.C. 953(a)), one may safely assume that its jurisdiction extends, as the National Foundation's explicitly does, to all of the territories. The Institute of Museum Services' regulations are consistent with this construction. They provide at 45 CFR 1180.5(a) that among the museums that may apply for a grant under the Act are museums located in the Virgin Islands, Guam, Samoa, and the Northern Marianas.

(g) Indemnity for Exhibitions of Arts and Artifacts (20 U.S.C. 971-977) permits the Federal Council on the Arts and Humanities to enter into agreements to indemnify against the loss or damage of works of art if they are of educational, cultural, historical, or scientific value, and if the Director of the U.S. Information Agency certifies that their exhibition--in the United States "or elsewhere"--is "in the national interest" (20 U.S.C. 972). Nothing in the Act would foreclose a person or nonprofit organization in the territories from applying for such indemnification.

Conclusion: The laws considered herein pertaining to education now accommodate the territories satisfactorily, but when it is convenient to do so, those pertaining to Defense Department schools should be amended so that the Northern Marianas, like the other territories, is not regarded as "overseas" for purposes of such laws (discussed at (d) and (e) above).

Federal agency comments: Comments were requested from the Departments of Education, Defense, and Justice, and from the National Endowment for the Arts, the National Endowment for the Humanities, and the Institute of Museum Services. All comments received have been reflected above.

Memorandum No. 20-4
April 1988
Revised November 1988

Subject: Higher Education Resources and Student Assistance
Title 20, Chapter 28 (20 U.S.C. 1001-1146)

Purpose: To provide for the enhancement of postsecondary education through Federal financial assistance to States and territories, their local education agencies, and their institutions of higher education, and to provide financial assistance to students.

Territorial Application: The Higher Education Act (which constitutes this chapter of Title 20) applies fully to the territories--with minor exceptions discussed below. The Act evidences unusual sensitivity to territorial needs, and they have profited from it.

The portion of the Higher Education Act that pertains to work-study programs is codified at 42 U.S.C. 2751 et seq., and is considered in Memorandum No. 42-11(k).

Recommendation: The Higher Education Act requires no significant change to accommodate the territories.

Discussion: The Act in General - Since its enactment in 1965, the Higher Education Act has been applicable to the territories, naming the Virgin Islands, Guam, and Samoa at the outset, with the Northern Marianas being added in 1977 (20 U.S.C. 1141(b)). Although it was not until 1980 that the Act was amended to make extensive provision for the uniqueness of the territories (a matter discussed below), the Act in earlier years made particular reference to them from time to time, thereby displaying some sensitivity to their particular needs. (For example, the territories were accorded a generous allotment ratio for purposes of community college construction under former 20 U.S.C. 1135a-1(e); and they shared in a relatively generous set-aside for purposes of community college educational programs under former 20 U.S.C. 1135a-1(a)). For the most part, however, territorial institutions of higher learning received relatively little Federal assistance under the Act in its early years because their needs differ from

those of mainland institutions, and because they could not compete successfully with State institutions for discretionary grants.

The Higher Education Act contained, and as amended in the 1980's contains, a substantial number of Federal financial assistance programs--in excess of 40--and almost all of them involve "discretionary" (or "project") grants, as opposed to "formula" grants. Formula grants are paid on the basis of an entitlement derived from a statutory formula. Discretionary grants are those given on the basis of applications filed with respect to programs and projects authorized and encouraged by the Act. The territories usually fare badly in such a competitive process under Federal programs generally, for their projects are small and often unusual. As to formula grants, however, by definition the territories receive their fair share. Formula grants under the Higher Education Act are those relating to financial aid to students (20 U.S.C. 1070a, 1070b, 1070c, 1071, and 1087aa); to particular scholarship programs (20 U.S.C. 1111 and 1113b); and for construction at community colleges, with a special allotment ratio for the territories (20 U.S.C. 1132b-2(b)), and at other institutions of higher learning in the State or territory (20 U.S.C. 1132b-2(c)). All other grants provided for in the Higher Education Act are discretionary.

Special Provisions for the Territories - It was in this state of affairs that the Congress in 1980 directed the Secretary of Education to study the unique educational needs of the territories in the area of higher education and to report the results. The study, entitled Postsecondary Education in the U.S. Territories, dated May 1982, has since given rise to implementing legislation.

(The Northern Marianas Islands Commission on Federal Laws gave particular attention to this 1980 Act and to the 1982 report, and the pertinent pages of that Commission's Report (pages 138-148) contain a thoughtful discussion on the general subject, as well as a useful summary of the major conclusions in the Secretary of Education's 1982 report. Those pages should be reviewed, therefore, for further information on these points.)

The 1982 report was the subject of legislation in 1986 that focussed upon the territories. The territories' provision, section 1204 of the Higher Education Act (20 U.S.C. 1144a), now contains the following three subsections:

-- Subsection (a) requires the Secretary of Education "to waive the eligibility criteria of any postsecondary education program" administered by the Department of Education whenever such criteria fail to take into account "the unique circumstances in Guam, the Virgin Islands, American Samoa, . . . and the Northern Mariana Islands"; and he is to give priority to territorial proposals that otherwise meet program criteria.

-- Subsection (b) requires the Secretary to promulgate regulations "in accordance with the recommendations" in the 1982 report, "in order to adapt programs under . . . [the Higher Education] Act to the needs of" the four territories; and he may consolidate grants.

-- Subsection (c) authorizes \$2 million annually, through fiscal year 1991, to be paid to Guam toward the costs of postsecondary education there for nonresident students from the Trust Territory, the Northern Marianas, and Samoa.

Proposed regulations pursuant to (b) were issued in October 1987 (52 Fed. Reg. 39896). Final regulations are expected to be issued soon, and are likely to be similar to those proposed. The proposed regulations do not affect any of the formula grant programs referred to above, and particularly they do not affect any part of the law relating to financial assistance to students. But the proposed regulations do implement the waiver and priority recommendations of the 1982 report, as required by the 1986 legislation, with respect to specified discretionary grant programs. That is, they require the waiver of "any eligibility criterion . . . if that criterion does not take into account the unique circumstances" of each of the territories. And for purposes of making awards

of grants for the specified programs, the Secretary of Education is required to add funding points to the applications from institutions in the territories.

The discretionary programs affected total 23 in number, as listed in the proposed regulations, and all are ones of special relevance to territorial institutions: strengthening of libraries (20 U.S.C. 1021), strengthening the institutions by improved academic quality, better institutional management, and greater fiscal stability (20 U.S.C. 1057), expanded endowments (20 U.S.C. 1064), and others. A sensible effort has obviously been made to facilitate the awarding of discretionary grants to territorial institutions of higher learning on subjects that relate to matters of realistic territorial concern--and the waiver of eligibility criteria where such criteria are inappropriate, and the awarding of additional points to territorial applications, will assure their receipt of relatively larger amounts of grant funds.

The program that has been launched does not provide for a block grant, discussed in the 1982 report as being strongly urged by territorial educators, and recommended in the 1985 Northern Marianas Commission report (see Appendix). Such a block grant would go well beyond the "consolidation" permitted under existing law and, as envisioned by its proponents, would award to each territory an annual sum made up of amounts to which the territory is entitled under all of the formula grant programs under the Act, as well as a specified percentage of the funds appropriated for all discretionary grant programs throughout the United States. (The Northern Marianas Commission suggested .33% of all funds appropriated for discretionary grant programs, for the Northern Marianas alone. That figure would, if percentages were added for the other three territories, and if they were adjusted roughly on the basis of territorial populations, become insupportably high--in the range of 5%.) One difficulty is that some of the discretionary programs are inapropos for the territories. In any event, it would seem sound to weigh the results of the 1986 legislation and the forthcoming regulations, before proceeding further. There is reason to suppose that they will result in substantial benefit for higher education institutions in the territories.

As to the authorization described above for Guam in subsection (c), Guam has received \$500,000 annually toward the cost of educating nonresident students from the Trust Territory, the Northern Marianas, and Samoa.

Desirable perfecting amendments - It is clear that the Higher Education Act applies to the territories, and particular provisions of it from time to time reinforce that result. In two particulars, however, further legislation would be desirable: first, to extend the Honors Scholarship Program to the territories, and second, to name the Northern Marianas expressly in certain sections.

As to the first,^{1/} the Robert C. Byrd Honors Scholarship Program provides for formula grants to the States, the District of Columbia, and Puerto Rico for college freshman-year study by "exceptionally able students who show promise of continued excellence" (20 U.S.C. 1070d-31). The award is \$1500, and ten scholarships are to be awarded for each Congressional district in a State, with 10 also awarded in the District of Columbia and 10 in Puerto Rico (20 U.S.C. 1070d-37(b)). This appears to be the only program under the Higher Education Act that does not extend, at least potentially, to the territories. The readily available legislative history is silent as to why (1984 U.S. Code Cong. and Admin. News 4847). The territories' exclusion may be an oversight. In any event, the exclusion seems baseless and ought to be corrected--perhaps by permitting five scholarships per territory each year. The number is probably less important than the principle of inclusion.

As to the second shortcoming,^{2/} from time to time the Act makes express reference to the Virgin Islands, Guam, Samoa, and the Trust Territory, but does not refer expressly to the

^{1/} This defect was corrected by Public Law 102-325 (1992).

^{2/} Several of the defects identified, but not all, were corrected by Public Law 102-325 (1992).

Northern Mariana Islands. This has apparently posed no problem to the Department of Education, but it would be well to correct such provisions, lest an overly cautious administrator in the future reach a conclusion that is to the Northern Marianas' disadvantage. In general, the Congressional intent to include the Northern Marianas is abundantly clear, both from the express reference to it in the major definition (20 U.S.C. 1141(b)) and from the various internal references to the Northern Marianas throughout the Act (e.g., 20 U.S.C. 1109d(3), 1113b(a)(1), 1133a(d)(2)). But in a few instances cited below, there is no such reference to the "Northern Marianas Islands," although the "Trust Territory of the Pacific Islands," does appear. Of course the Northern Marianas were, until November 4, 1986, a part of the Trust Territory, but they are no longer. Additionally, references to Guam can often serve, under section 502(a)(2) of the Northern Marianas Covenant, to extend the law in which "Guam" appears to the Northern Marianas. But that effect can be accorded only to laws in effect on January 9, 1978, and the laws now in question were enacted at a later date. Therefore, it is suggested (not urgently, but so as to satisfy that hypothetical overly-cautious administrator) that a reference to "the Northern Marianas Islands" be added at the following places:

-- For purposes of Pell Grants, with the other territories in the tax allowance tables at the end of 20 U.S.C. 1070a-2(d), 1070a-3(c), and 1070a-4(c);

-- For purposes of certain other financial assistance to students, with the other territories in the tax allowance tables at the end of 20 U.S.C. 1087oo(c)(2) and (g)(3), 1087pp(b)(2), and 1087qq(b)(2);

-- For construction at public community colleges and technical institutes, in the section providing a special allotment ratio for the territories (20 U.S.C. 1132b-2(b)(2)(B)(ii)); and

-- For purposes of the subchapter on the construction of academic facilities generally, in the definition of "State" (20 U.S.C. 1132i-1 (9)).

Conclusion: The Higher Education Act requires no significant change to accommodate the territories, pending the results of major legislation for the territories enacted in 1986. When it is convenient, however, minor changes should be made to perfect a few sections, cited above.

Federal agencies comment: Comments were requested from the Department of Justice and the Department of Education. All comments received have been reflected above.

Memorandum No. 20-5
April 1988
Revised November 1988

- Subject:
- (a) Adult Education Programs
Title 20, Chapter 30 (20 U.S.C. 1201-1213d)
 - (b) General Provisions Concerning Education
Title 20, Chapter 31 (20 U.S.C. 1221-1234i)
 - (c) Education of Handicapped
Title 20, Chapter 33 (20 U.S.C. 1400-1485)
 - (d) National Commission on Libraries and Information
Science
Title 20, Chapter 34 (20 U.S.C. 1501-1506)
 - (e) Assignment or Transportation of Students
Title 20, Chapter 37 (20 U.S.C. 1651-1656)
 - (f) Discrimination Based on Sex or Blindness
Title 20, Chapter 38 (20 U.S.C. 1681-1686)
 - (g) Equal Educational Opportunities and Transportation
of Students
Title 20, Chapter 39 (20 U.S.C. 1701-1758)
 - (h) Harry S. Truman Memorial Scholarships
Title 20, Chapter 42 (20 U.S.C. 2001-2013)
 - (i) American Folklife Preservation
Title 20, Chapter 43 (20 U.S.C. 2101-2107)

Comments: These chapters of Title 20 are, for the most part, applicable to the territories, but the General Education Provisions Act, discussed at (b) below, needs attention so as to make clear that it applies to the territories as fully as to the States.

Discussion: (a) The chapter entitled Adult Education Programs (20 U.S.C. 1201-1213d) contains the Adult Education Act, first enacted in 1966 and materially amended in 1988. The Act applies fully to the territories, defining the term "State" to include the Virgin Islands, Guam, Samoa, and the Northern Marianas (20 U.S.C. 1201a(7)). Each of these territories is guaranteed at least \$100,000 annually, while the minimum

guaranteed to each State is \$250,000 (20 U.S.C. 1201b(b)). Sums remaining for allotment are distributed to the States and territories on the basis of a formula that takes into account the number of adults who have not completed secondary school. The Federal share for carrying out State plans is 90% at the outset, being reduced to 75% over several years, while that for the territories is 100% (20 U.S.C. 1209(a)). These provisions of the Adult Education Act must be viewed as treating the territories generously.

The "State plan" that is a prerequisite for Federal aid under the Act is an elaborate one (20 U.S.C. 1206a), but that problem can be overcome by use of the grant consolidation authority (see Prefatory Comment on these Title 20 memoranda). Prior to 1968, adult education programs were susceptible to grant consolidation (see 43 CFR 76.125(c)), and the foreseen revision of the regulations will very likely include such programs as well.

(b) The chapter entitled General Provisions Concerning Education (20 U.S.C. 1221-1234i) contains the General Education Provisions Act, first enacted in 1968 and often expanded and otherwise amended in the years since. Surprisingly, for laws enacted so recently, these contain deficiencies with respect to their territorial application. In two instances their effect is confined to the States, the District of Columbia, and Puerto Rico. In many other instances the provisions apply on their face to the "States" alone, and sometimes to their local educational agencies; and in the absence of any statutory indication that such provisions are intended also to apply to the territories, the careful constructionist might conclude that they do not. The subject matter is essentially housekeeping within the Department of Education, but the deficiencies as to the territories should not for that reason be dismissed as unimportant, because in at least some instances the provisions touch matters of potential value or concern to the territories.

The Department of Education advises informally, however, that in its view the definition of "State" to include the territories that is contained in the Department of Education

Organization Act (20 U.S.C. 3404(5), see Memorandum No. 20-6(d), is sufficient to permit the same definition in the General Education Provisions Act (except in the two instances, discussed below, where the territories are expressly excluded). The Department of Education reasons that its Organization Act, as the more general statute,

controls the definition of "State" where the General Education Provisions Act is silent because the General Education Provisions Act was transferred to the Department of Education Act's umbrella of responsibility when the Department was established. Thus, the definition of "State" contained in the Department of Education Organization Act would be applied to those provisions of the General Education Provisions Act where the term is not defined.

Turning first to the provisions that explicitly exclude the territories, one involves the National Institute of Education, and the other, the Center for Education Statistics. For the purposes of each, the terms "United States" and "State" include the States, the District of Columbia, and Puerto Rico only (20 U.S.C. 1221e(a)(3)(E) and 1221e-1(h)).^{1/} The National Institute of Education, which is directed "to improve education in the United States" (20 U.S.C. 1221e(b)(2)), is asked among many other things to collect education statistics "in the United States and other nations" (20 U.S.C. 1221e(b)(3)(C)), and to provide certain technical assistance "to State educational agencies" (20 U.S.C. 1221e(e)(1)(E)). The exclusion of the territories from such authority seems baseless. Similarly, the Center for Education Statistics is to collect statistics "related to education in the United States and in other nations" (20 U.S.C. 1221e-1(b)) and, among other things, to "assist State and local educational agencies" in their data collection activities (20 U.S.C. 1221e-1(b)(3)). The two definitions of "United States" and "State" cited above

^{1/} By Public Law 100-297 (1988), 20 U.S.C. 1221e-1(h) was redesignated 20 U.S.C. 1221e-1(j).

should be expanded to include the territories. The same result could be achieved, the Department of Education suggests informally, merely by repealing the two provisions in question (20 U.S.C. 1221e(a)(3)(E) and 1221e-1(h))--this on the assumption that the definition of "State" in the Department of Education Organization Act carries over, as explained above, to the General Education Provisions Act.

Second, as to provisions that apply to the "States," undefined in the General Education Provisions Act, these are numerous. As stated above, the General Education Provisions Act contains no definition of the term, and none appears in the U.S. Code for purposes of this chapter 31 of Title 20 generally. The Department of Education believes, however, as explained above, that the definition at 20 U.S.C. 3404(5) applies and that the territories are thereby covered. That is almost certainly sufficient.

It may be, however, that a convenient legislative vehicle might present itself in which it would be possible to insert, with ease, a definition of "State" in the General Education Provisions Act. Such a definition would eliminate any question and could thus be of benefit to the territories. There appear to be no provisions of the General Education Provisions Act that are applicable to the States that would be inappropriate if applied also to the Virgin Islands, Guam, American Samoa, and the Northern Marianas. The Department of Education informally agrees with that judgment. The sections of the General Education Provisions Act that would thereby be clarified are these:

20 U.S.C. 1221-3, pertaining to paper work control, which in subsection (f) permits grants to the States for education management information systems (but the Department of Education advises informally that it expects to recommend the repeal of that section);

20 U.S.C. 1221e-1a, requiring annual reports on the use of Federal funds;

20 U.S.C. 1223, permitting advance appropriation of funds for elementary and secondary education programs;

20 U.S.C. 1231(a), pertaining to the approval of State plans;

20 U.S.C. 1231a(a), requiring the dissemination of information about Federal programs;

20 U.S.C. 1231b, pertaining to a catalog of Federal education assistance programs;

20 U.S.C. 1231b-2, providing an appeal procedure for those aggrieved by State action;

20 U.S.C. 1231c, permitting technical assistance to State agencies with respect to applications for Federal aid;

20 U.S.C. 1231d, pertaining to payments to encourage parental involvement;

20 U.S.C. 1231e, requiring a reduction in Federal financial assistance for failure to comply with a portion of the 1964 Civil Rights Act;

20 U.S.C. 1231g, permitting common applications for grants in certain circumstances;

20 U.S.C. 1232(c), requiring uniformity of Department of Education regulations;

20 U.S.C. 1232c, 1232d, and 1232e, pertaining to State enforcement and to certain applications for Federal assistance;

20 U.S.C. 1232g(b), regulating the release of education records;

20 U.S.C. 1232i, limiting the withholding of Federal assistance; and

20 U.S.C. 1234a, 1234b, 1234c, 1234d, and 1234e, relating to enforcement, and more particularly to audit, the withholding of payments, cease and desist orders, judicial review, and the use of withheld funds.

The judicial review provision at 20 U.S.C. 1234d(b) also needs expansion to provide for a suitable review court for American Samoa, since it is not within any Court of Appeals circuit. Perhaps the High Court of American Samoa could be given jurisdiction, or alternatively, the Court of Appeals for the District of Columbia Circuit might be named.

(c) Education of Handicapped (20 U.S.C. 1400-1485) contains the Education of the Handicapped Act, enacted in 1970. It not only applies to all of the territories, but makes special and helpful arrangements to meet their needs.

The Act authorizes a number of grant programs for State educational agencies and others, and because the term "State" is defined to include each of the territories expressly (20 U.S.C. 1401(a)(6)), they are all potential beneficiaries. The Act also provides for two significant formula grant programs, and in each instance special provision is made for the territories. The most important of these is the grant program for Assistance to States for Education of All Handicapped Children (20 U.S.C. 1411). The amount of each State's grant is determined essentially by the number of handicapped children in the State who are receiving special education and related services on December 1 of the fiscal year preceding the fiscal year for which the determination is made. The territories are excluded from these provisions, however (20 U.S.C. 1411(a)(2)), and they instead are entitled to a grant

determined by the Secretary of Education "in accordance with criteria based on respective needs" (20 U.S.C. 1411(e)(2)). A ceiling for all the territories, plus the Trust Territory^{2/}, of 1 per cent of the total amount available for all of the States is imposed. The purpose of the program is to assure "all handicapped children . . . a free appropriate education" (20 U.S.C. 1400(c)).

Similarly, with respect to a formula grant program for services to handicapped infants and toddlers, enacted in 1986, the territories are also excluded from the formula (based on population) that applies to the States. Together with the Federated States, the Marshalls, and Palau (for a time), they are instead entitled to receive 1% of the amounts appropriated for the entire program, "in accordance with their respective needs" (20 U.S.C. 1484(a)).

The Act appears to deal appropriately with the territories.

(d) The National Commission on Libraries and Information Science (20 U.S.C. 1501-1506) refers to the independent Commission of that name, whose responsibility it is to encourage library and information services "adequate to meet the needs of the people of the United States" (20 U.S.C. 1501). The Commission is to conduct studies, develop plans, and give advice to "Federal, State, local, and private agencies" (20 U.S.C. 1504(5)). Although the term "State" is undefined, the law is clearly intended to take account of broad national needs, and it seems sufficient as it stands to take into account the needs of the territories.

^{2/} Under section 105(i)(2) of the Compact of Free Association Act (99 Stat. 1770, note following 48 U.S.C. 1681), the Federated States of Micronesia and the Marshalls are entitled to receive Federal "financial assistance for education" in diminishing amounts through fiscal year 1988. There is no provision for continued assistance to them after September 30, 1988. Until the status of Palau is resolved, however, it continues to constitute the "Trust Territory", and would thus be entitled to benefit from the programs of the Education of the Handicapped Act.

(e) The Assignment or Transportation of Students (20 U.S.C. 1651-1656) refers to a 1972 Act prohibiting the use of Federal funds for busing to overcome racial imbalance in schools. The territories are comprehended, in light of a reference to "every State, district, territory, Commonwealth, or possession of the United States" and to schools "in the northern, eastern, western, or southern part of the United States" (20 U.S.C. 1656).

(f) Discrimination Based on Sex or Blindness (20 U.S.C. 1681-1686) contains provisions derived from a 1972 enactment that prohibits discrimination based on sex or based on blindness or visual impairment under any Federally assisted education program (with exceptions permitting certain sex discrimination) against any "person in the United States" (20 U.S.C. 1681, 1684). The term "United States" is not defined, but because Federal laws providing assistance to schools and colleges apply generally to the territories, these anti-discrimination laws would apply to them as well.

(g) The chapter entitled Equal Education Opportunities and Transportation of Students (20 U.S.C. 1701-1758) is derived from the Equal Education Opportunities Act of 1974. The Act has two essential purposes: to prohibit dual (i.e., segregated) school systems, in which assignment of students is based on race, color, sex, or national origin (20 U.S.C. 1703); and to impose various limitations upon the use of busing to overcome racial imbalance (20 U.S.C. 1751-1758). The application of the law to the territories is reasonably clear, notwithstanding its explicit application usually to the "States" (e.g., 20 U.S.C. 1703, 1715, 1720(a)), a term that is undefined. One section, however, which refers to the restricted power of the courts to order busing to achieve racial balance, makes reference to "every . . . territory, Commonwealth, or possession of the United States" (20 U.S.C. 1754), and the policy declared by Congress is apparently intended to be widely applicable (20 U.S.C. 1701, 1702), so it is reasonable to suppose that the territories are comprehended by it. The vesting of enforcement jurisdiction in Federal district courts (20 U.S.C. 1708) excludes Samoa, which has none, but it reinforces the application of the Act to the other three that do. But no territory has, and none is likely

to have, a dual school system, so this deficiency as to Samoa is without practical effect.

(h) Harry S. Truman Memorial Scholarships (20 U.S.C. 2001-2013) are granted to qualified students who plan careers in the public service. They are generous (up to \$10,000 annually, subject to indexing), and are available to "at least one resident applicant" who meets minimum criteria from each "State". That term includes the Virgin Islands, Guam, and American Samoa (20 U.S.C. 2002(5)), and by operation of section 502(a)(2) of the Northern Marianas Covenant, it also includes the Northern Marianas.

(i) American Folklife Preservation (20 U.S.C. 2101-2107) creates a Federal program for the support and encouragement of American folklife traditions and arts. It involves among other things project grants for research and for live performances, festivals, and exhibits on American folklife. Individuals and groups from all of the territories are eligible (20 U.S.C. 2102(6)), the Northern Marianas by operation of section 502(a)(2) of the Covenant.

Conclusion: Most of the laws considered herein are applicable to the territories, with two major grant statutes (Basic Education for Adults (a), and Education of the Handicapped (c)) being especially tailored to meet territorial needs. Several other laws are not expressly applicable to the territories, but reasonable arguments can be made for their application, and in each case the law is not of material consequence to the territories. But the General Education Provisions Act ((b) above) needs amendment in two particulars to redefine the term "State" so as to expand it to include the territories, and generally to provide that the territories are "States".

Federal agency comment: Comments were requested from the Department of Education and Department of Justice. All comments received have been reflected above.

- Subject:
- (a) Vocational Education
Title 20, Chapter 44 (20 U.S.C. 2301-2471)
 - (b) Career Education and Career Development
Title 20, Chapter 45 (20 U.S.C. 2501-2569)
 - (c) Strengthening and Improvement of Elementary and
Secondary Schools
Title 20, Chapter 47 (20 U.S.C. 2701-3386)
 - (d) Department of Education
Title 20, Chapter 48 (20 U.S.C. 3401-3510)
 - (e) Asbestos School Hazard Detection and Control
Title 20, Chapter 49 (20 U.S.C. 3601-3611)
 - (f) National Center for the Study of Afro-American
History and Culture
Title 20, Chapter 50 (20 U.S.C. 3701-3703)
 - (g) Education for Economic Security
Title 20, Chapter 52 (20 U.S.C. 3901-4074)
 - (h) Education of the Deaf
Title 20, Chapter 55 (20 U.S.C. 4301-4362)
 - (i) American Indian, Alaska Native, and Native Hawaiian
Culture and Art Development
Title 20, Chapter 56 (20 U.S.C. 4401-4451)
 - (j) James Madison Memorial Fellowship Program
Title 20, Chapter 57 (20 U.S.C. 4501-4517)
 - (k) Barry Goldwater Scholarship and Excellence in
Education Program
Title 20, Chapter 59 (20 U.S.C. 4701-4711)
 - (l) Fund for the Improvement and Reform of Schools and
Teaching
Title 20, Chapter 60 (20 U.S.C. 4801-4843)
 - (m) Education for Native Hawaiians
Title 20, Chapter 61 (20 U.S.C. 4901-4909)

Comment: The laws pertaining to education that are considered herein apply for the most part to the territories, but two--the Elementary and Secondary Education Act ((c) below) and the Fund for the Improvement and Reform of Schools and Teaching ((1) below)--ought to be amended in minor particulars.

Discussion: (a) The Vocational Education Act (20 U.S.C. 2301-2471), fully titled the Carl D. Perkins Vocational Education Act, was revised in its entirety in 1984, and in its current form it applies fully to the territories, providing potentially generous treatment for them financially, but otherwise displaying little deference to their unique conditions. Their unique circumstances can be met, however, under the grant consolidation authority of 48 U.S.C. 1469a (see Prefatory Comment to these Title 20 memoranda), so that modification of the Act itself does not appear to be necessary.

Each of the territories is, explicitly, a beneficiary of Federal assistance under the Act (20 U.S.C. 2471(27)). And each is entitled to assistance that may be, when compared to that which the States receive, comparatively generous. That is, a State receives an amount based on the State's population within particular age groups and on an allotment ratio reflecting the State's per capita income. That allotment ratio in the case of the States can range between 40% and 60%, but it is stipulated at 60% for each of the territories (20 U.S.C. 2311(c)(1)(B)). Additionally, each territory is required to receive a minimum of \$200,000 "for all programs under the Act" (20 U.S.C. 2311(a)(3)(C)).

Beyond that, the Act's requirements are unusually rigid, and they could make assistance under the Act both difficult to achieve and of less value to the territories--unless overcome by grant consolidation. For example, the administrative machinery within each "State", that is a prerequisite for receiving Federal assistance, is elaborate and expensive (20 U.S.C. 2321, 2322), with the territories excused only from the requirement that one individual be employed full time to perform certain functions (20 U.S.C. 2321(b)(2)); the "State" plan that must be approved as a foundation for grants is

complex both procedurally and substantively (20 U.S.C. 2323); and the principal program for which Federal assistance is available--"Vocational Education Opportunities" (20 U.S.C. 2331-2334)--contains a requirement that over 50% of the funds be used for six categories of students (20 U.S.C. (2332), including the handicapped (10%), the disadvantaged (22%) single parents and homemakers (8.5%), criminal offenders in correctional institutions (1%), and other defined groups. This distribution is probably not realistic with respect to the territories.

Detailed requirements of the foregoing sort (duplicated elsewhere in the Act, but the above examples will suffice) doubtless have value and are manageable in the States and other heavily populated areas, but they are, at a minimum, disincentives in the territories. Inasmuch as there has been for decades agreement that vocational education programs ought particularly to be encouraged in the territories, Federal assistance should be provided to them in a manner that reflects their size and needs. In these circumstances, the grant consolidation authority is particularly helpful, because it permits a territory that chooses to do so to overcome the foregoing problems: burdensome administrative machinery, an elaborate "State" plan, specific allocations to programs of comparatively little territorial concern. Because the Vocational Education Act is among those susceptible to grant consolidation (34 CFR 76.125), amendments to the Act itself to meet territorial needs are not required.

(b) The chapter titled Career Education and Career Development (20 U.S.C. 2501-2569) contains two Federal financial assistance programs, but the authorizations for appropriations have expired (20 U.S.C. 2502a), 2532(a)). The territories were, however, all eligible for assistance (20 U.S.C. 2502(b)(2), 2532(b)(3)).

(c) The chapter entitled Strengthening and Improvement of Elementary and Secondary Schools (20 U.S.C. 2701-3386) contains the Elementary and Secondary Education Act, first enacted in 1965, often amended in following years, and substantially revised and modified in 1988 by Public Law 100-297, approved April 28, 1988. The Act contains a great

number of programs of Federal financial assistance, and it is of importance to the territories. In its present form, the Act is applicable to the territories--with two exceptions discussed below (the Even Start program and the program of Presidential awards for teaching excellence)--with the territories sometimes being accorded the same treatment as the States, and other times being the subject of particular set-asides. They are, in any event, each defined by name as "States" for purposes of the Act (20 U.S.C. 2891(22)), except where otherwise provided.

As amended in 1988, the Act displays considerable concern for special territorial needs, and it perpetuates an earlier section that authorizes particular flexibility with respect to the territories. At 20 U.S.C. 3383(a), the Secretary of Education is authorized, if he determines "that compliance with any of the requirements" of the Elementary and Secondary Education Act is "impractical or inappropriate because of conditions or circumstances particular to" Guam, Samoa, the Virgin Islands, or the Northern Marianas, to waive any of such requirements on the request of the territorial educational agency for that jurisdiction.^{1/}

^{1/} Section 3383(a) of Title 20 applies not only to the four territories, but also to "the Trust Territory of the Pacific Islands." When the Elementary and Secondary Education Act refers to the Virgin Islands, Guam, Samoa, and the Northern Marianas, as it often does (as, for example, in the definition of "State" at 20 U.S.C. 2891(22)), it consistently refers to the Trust Territory as well. Because the Trust Territory is not now within the scope of this study, it will not be referred to further in this discussion of the Elementary and Secondary Education Act. It should be noted, however, that under section 105(i)(2) of the Compact of Free Association Act (99 Stat. 1770, note following 48 U.S.C. 1681), the Federated States of Micronesia and the Marshalls are entitled to receive Federal "financial assistance for education" in diminishing amounts through fiscal year 1988. There is no provision for continued assistance to them on this subject after September 30, 1988. Until the status of Palau is resolved, however, it continues to constitute the "Trust Territory", and would thus be entitled to benefit from the programs of the Elementary and Secondary Education Act.

Notice is to be given in the Federal Register, and any Secretarial waiver may be subject to conditions the Secretary deems necessary to carry out the purposes of the Act. This authority in the Secretary of Education is in addition to the grant consolidation authority provided for in 48 U.S.C. 1469a (see the Prefatory Note to these Title 20 memoranda), and the Department of Education advises informally that it is engaged in the revision of its grant consolidation regulations to reflect programs contained in the 1988 (Public Law 100-297) legislation. Accordingly, there are two means by which particular territorial needs can be met under the Elementary and Secondary Education Act, and that fact, plus other provisions for the territories in the Act itself (discussed below) largely obviate any need for further legislation on this subject.

Because the Act is rightly viewed as having special importance to the territories, there follow below (i) a discussion of the few provisions that might warrant amendment, (ii) information as to some of the Federal programs under which the territories are treated as States, (iii) information as to others under which they are subject to special set-asides, and (iv) a discussion of the sections directed to programs solely for the territories.

(i) As noted above, two programs under the Act are not available to the territories. The new "Even Start" program (20 U.S.C. 2741-2749) applies only to the States, the District of Columbia, and Puerto Rico (20 U.S.C. 2742(c)).^{2/} This is a program to integrate early childhood education and adult education (20 U.S.C. 2741), in order to help low-income parents become active in their children's development, so as to provide children with sufficient educational assistance to permit them to begin elementary school with the same degree of "readiness" as other children. An examination of the extensive committee reports on the legislation (H. Rept. 100-95, S. Rept. 100-222, H. Conf. Rept. 100-567) reveals no discussion as to the territorial exclusion, and no rationale for it is obvious. Certainly the territories' need for this

^{2/} As a result of Public Law 102-73 (1991), the provision is now designated 20 U.S.C. 2742(d)(3).

kind of special educational preparation for low-income children is no less than that of other areas of the United States. Legislation to permit the territories to participate would be desirable.

Similarly, the program of Presidential awards for teaching excellence in mathematics, science, and foreign languages in elementary and secondary schools applies also only to the States, the District of Columbia, and Puerto Rico (20 U.S.C. 3011(b)).^{3/} Awards are to be given annually to elementary and secondary school teachers in those 52 jurisdictions. Prior legislation on this subject also excluded the territories (former 20 U.S.C. 4001(b)). Congressional committee reports on the 1988 legislation (H. Rept. 100-95, S. Rept. 100-222) are again silent as to the rationale for the territorial exclusion. It may be that the numbers of teachers in the territories constitute an insufficient pool to warrant selections on the same numerical basis as the States, but that difficulty could be overcome in various ways. In any event, excellent teachers in the territories ought not to be ineligible by law.

A final shortcoming should be mentioned, but it is sufficiently minor as not to require legislative attention. The Secretary of Education may withhold funds from jurisdictions if they fail to comply with requirements associated with Federal assistance for certain programs (20 U.S.C. 2833), and the State (or territory) may appeal to the U.S. Court of Appeals in which the State (or territory) is located (20 U.S.C. 2834). Samoa is in none--a situation often recognized in this study, but not leading to a recommendation for legislation in cases where the subject matter seems of little likely concern to Samoa. That is the situation here.

(ii) The territories are treated as States for purposes of the following programs--and they thus receive no special attention in the law, apart from whatever might be

^{3/} This defect was corrected by Public Law 100-570 (1988), which extended the program to the "commonwealths, territories, and possessions . . .".

administratively granted under 20 U.S.C. 3383(a) or 48 U.S.C. 1469a:

Basic skills improvement for low-income or low-achieving children, or to prevent dropouts (20 U.S.C. 2761);

Assistance to magnet schools (20 U.S.C. 3021), which relate to desegregation plans, and are thus without practical concern to the territories;

Women's Educational Equity, to encourage equitable educational treatment for women and girls (20 U.S.C. 3041);

Assistance for the special education needs of gifted and talented students (20 U.S.C. 3061);

Allen J. Ellender Fellowships to secondary school students to increase understanding of the Federal Government (20 U.S.C. 3091);

Assistance in the education of immigrant children (20 U.S.C. 3121);

Assistance in demonstration projects on school dropouts and strengthening basic skills instruction (20 U.S.C. 3241, 3261); and

Assistance in bilingual education to meet problems of students with limited English proficiency (20 U.S.C. 3281).

The territories qualify for assistance under all of the foregoing programs, and most such programs are directed at educational problems that exist in the territories. Flexibility for the territories, if needed, can be achieved through use of the authority in 20 U.S.C. 3383(a) and 48 U.S.C. 1469a.

(iii) Several programs under the Elementary and Secondary Education Act provide for special set-asides for the territories, i.e., for the allocation to them of a specified percentage of the Federal funds appropriated for that particular program. The percentage vary, as do other terms associated with such programs, and in each case the Trust Territory is named as well (see footnote 1):

Basic grants for programs operated by local educational agencies are subject to a set-aside of "1 percent of the amount appropriated" for each fiscal year for payments to the States. The Secretary of Education is to allot that 1 percent among Guam, Samoa, the Virgin Islands, and the Northern Marianas "pursuant to such criteria as the Secretary determines will best carry out the purposes" of that part of the Act--but from the 1 percent he is also to allot funds to the Secretary of the Interior for the education of Indian children (20 U.S.C. 2711(a)(1)).

Appropriations for grants for State and local programs for educational improvement are subject to a set-aside of "not to exceed 1 percent" for payments to the four territories, "to be allotted in accordance with their respective needs" (20 U.S.C. 2921(a)(1)).

Appropriations for grants for strengthening teacher skills and for improving instruction in mathematics and science are subject to a set-aside of "not more than 1/2 of 1 percent for allocation among Guam, American Samoa, the Virgin Islands, the Northern Marianas . . . according to their

respective needs for assistance" (20 U.S.C. 2984(a)(1)(A)).

Appropriations for grants for foreign language assistance are subject to a set-aside of 1 percent for the territories, "to be allotted in accordance with their respective needs" (20 U.S.C. 3004(a)(1)).

Appropriations for programs concerning drug abuse and prevention are subject to a set-aside of 1 percent for the territories, "to be allotted in accordance with their respective needs" (20 U.S.C. 3182(a)(1)).

On the basis of population considerations, it will be observed that a reservation of either 1 percent or 1/2 of 1 percent for the territories is generous.

(iv) As amended in 1988, the Elementary and Secondary Education Act contains two sections on "Territorial Assistance", 20 U.S.C. 3141 and 3142. These are not new, having been enacted in 1978 (Public Law 95-561, secs. 1524, 1525), but they have now been made a part of the Act and codified. Section 3141 authorizes the appropriation of \$5 million for each of the five fiscal years beginning with fiscal year 1989 (that being the period of duration of most of the Elementary and Secondary Education Act) "for the purpose of providing general assistance to improve public education in the Virgin Islands". The legislative history explains that this special assistance results from "Federal legislation and a U.S. District Court decision" in the early 1970's requiring the Virgin Islands to educate its nonresident student population (H. Rept. 100-95, pp. 75-76)--i.e., the children of alien laborers, many of them illegally present at that time in the Virgin Islands. (See Memorandum No. 8-1.) That annual Federal grants to the Virgin Islands for improving public education are of value to the territory--and unquestionably needed--cannot be doubted. The question arises, however, as

to whether Guam, Samoa, and the Northern Marianas do not have a comparable need, and as a factual matter, they too have substantial alien populations.

Section 3142 of Title 20 authorizes the appropriation of \$2 million annually for the same five-year period "for the purpose of assisting teacher training programs" in Guam, Samoa, the Virgin Islands, and the Northern Marianas (as well as the Trust Territory, see footnote 1). The sums are to be allotted "among such territories on the basis of the need for such training", and the assistance may take the form of grants or contracts to provide teacher training. The legislative history of the provision recognizes the territories' particular need on this subject, given the number of uncertified teachers employed in them. (H. Rept. 100-95, p. 76).

The analysis of this long and complex Act results in the conclusions that it is, for the most part, deferential to special territorial requirements, but that two particular programs--Even Start and awards for teaching excellence--ought to be amended to permit participation in them by the territories.

(d) The chapter entitled the Department of Education (20 U.S.C. 3401-3510) contains the 1979 legislation that organized the Department. It concerns essentially matters of government housekeeping, but it is worth noting that it reasserts the primacy of State and local governments in educational policies and administration (20 U.S.C. 3403), and that the term "State" includes all of the territories (20 U.S.C. 3404(5)).

(e) Asbestos School Hazard Detection and Control (20 U.S.C. 3601-3611) contains the 1980 law providing Federal financial assistance for dealing with the problem of asbestos fibers in school buildings. The authority for the program has expired (20 U.S.C. 3604(a)), but the territories were all eligible to participate (20 U.S.C. 3610(8)). The subject is now covered by a portion of the Education for Economic Security Act of 1984, considered below at (g).

(f) The chapter entitled National Center for the Study of Afro-American History and Culture (20 U.S.C. 3701-3703) creates a commission to develop a plan for the construction and operation of such a Center. The law is not of direct concern to the territories.

(g) The Education for Economic Security Act (20 U.S.C. 3901-4074) was enacted in 1984 in order "to improve the quality of mathematics and science teaching and instruction in the United States" (20 U.S.C. 3901). The Act provides for a number of programs of Federal assistance, several of which have been moved to the Elementary and Secondary Education Act by Public Law 100-297 of April 1988 (and are therefore considered above in part (c)). All of the provisions that remain are applicable to the territories, in light of their inclusion in the definition of "State" at 20 U.S.C. 3902(10). Remaining programs and other provisions of the Education for Economic Security Act consist of the following:

-- Title I (20 U.S.C. 3911-3922), authorizes the National Science Foundation to make competitive grants for teacher institutes (one per "State", which includes the territories, if the proposal meets minimum requirements, 20 U.S.C. 3913(b)) and for the development of instructional materials and research methods, as well as for graduate fellowships and certain other activities. The territories are potential beneficiaries of these programs.

-- Title III (20 U.S.C. 3981-3988), creates a "partnership" program between business and educational institutions, to improve the quality of instruction in mathematics, science, and engineering. Federal funds may be obtained, to the extent of 50% of the program cost, with 30% derived from the business community. The territories are eligible to apply.

-- Title V (20 U.S.C. 4011-4022), concerns the abatement of the asbestos hazard in school buildings. Federal financial help, which may take the form of a

grant for 50% of the program cost, but the remainder is in the form of a loan (20 U.S.C. 4014(e)), is based on applications submitted by the Governors of States and territories. Of the amount appropriated under the Act, each State may receive a maximum of 1/2 of 1%, and the same maximum is reserved for the territories collectively (20 U.S.C. 4021(b)(1)). The reservation appears to be adequate. The territories probably have a school asbestos problem that is less than that of most States.

-- Title VIII (20 U.S.C. 4071-4074), prohibits a secondary school that receives Federal aid from denying "equal access" to meetings of student groups, based on religious, political, philosophical, or "other content of the speech at such meetings" (20 U.S.C. 4071(a)). The prohibition applies to such schools in the territories.

-- Title IX (20 U.S.C. 4081-4086), containing the Star Schools Program, was added in 1988 by Public Law 100-297. The program, which is expressly available to the territories (20 U.S.C. 4086(8)), involves demonstration grants to "telecommunications partnerships"--consisting of, among others, State or local educational agencies, institutions of higher education, teacher training centers, and potentially others (20 U.S.C. 4083)--for the development of audio and visual facilities to improve instruction.

In sum, the programs in the Education for Economic Security Act are available to the territories, and its provisions apply to them. There appear to be no provisions that require modifications for territorial purposes.

(h) The chapter entitled Education of the Deaf (20 U.S.C. 4301-4362) concerns Gallaudet University and other institutions and agencies of the deaf. It contains no provisions of particular concern or application to the territories.

(i) American Indian, Alaska Native, and Native Hawaiian Culture and Art Development (20 U.S.C. 4401-4451) contains the 1986 law that creates a national Institute of American Indian and Alaska Native Culture and Arts Development, and a program for Native Hawaiian Culture and Arts Development--with the purpose of preserving, supporting, revitalizing, and disseminating Indian and Native Hawaiian art and culture. The law contains no provisions of consequence for the territories, but it may inspire interest within them for Federal assistance in preserving and revitalizing their respective native art and cultures.

(j) The James Madison Memorial Fellowship Program (20 U.S.C. 4501-4517) involves fellowships for graduate study of the American Constitution, with the requirement that the recipient teach social studies or history at the secondary school level for as many years as assistance under the program was awarded. Applicants from the territories are eligible to apply (20 U.S.C. 4507(c)).

(k) The Barry Goldwater Scholarship and Excellence in Education Program (20 U.S.C. 4701-4711), created in 1986, provides for scholarships and fellowships for the study of science and mathematics, and for honoraria for volunteers who contribute to the quality of instruction in these subjects in secondary schools. The program applies fully to students and volunteers in the territories (20 U.S.C. 4702(5), (6)).

(l) The Fund for the Improvement and Reform of Schools and Teaching (20 U.S.C. 4801-4843) was added in 1988 by Public Law 100-297. It provides for two Federal assistance programs: (a) grants to or contracts with "State" educational agencies, institutions of higher education, and others to improve educational opportunities for and the performance of elementary and secondary school students and teachers (20 U.S.C. 4811); and (b) grants to local educational agencies to increase the involvement of families in the education of their children (20 U.S.C. 4821). The territories are not expressly covered, either in the definitions (20 U.S.C. 4843) or elsewhere in the pertinent part of Public Law 100-297--a slightly surprising result, given the care with which the territories are comprehended elsewhere in that law and

generally in Federal laws pertaining to aid to education. The family-involvement grants, however, are inferentially available to the territories, in light of the provision that makes agencies eligible if they are also eligible for basic grants under the Elementary and Secondary Education Act (20 U.S.C. 4822), as the territories explicitly are (20 U.S.C. 2711). There is no basis for a similar bootstrap argument as to the grants provided under 20 U.S.C. 4811 (for improvement of schools and teaching). It may be that the Department of Education would find it possible to apply the broad definition of "State" that includes the territories and that is found in the Department of Education Organization Act (20 U.S.C. 3404(5))--as explained in Memorandum No. 20-5, part (b). But it would be well to make the point more clearly by a definition of "State" to include them, to be added to 20 U.S.C. 4843.

(m) Education for Native Hawaiians (20 U.S.C. 4901-4909) provides for a program of Federal assistance to citizen-residents of Hawaii who are descended from those who lived in Hawaii in 1778 (the year of Captain Cook's discovery). The program has no application to the territories, but it may spark aspirations on their part.

Conclusion: The laws pertaining to education that are considered herein largely make suitable provision for the territories. But the Elementary and Secondary Education Act, discussed at (c) above, should be amended to permit territorial participation in two programs from which they are now excluded, and one program in the Fund for the Improvement and Reform of Schools and Teaching, discussed at (1), ought to be clarified as to its territorial application.

Federal agency comment: Comments were requested from the Department of Education and the Department of Justice. All comments received have been reflected above.

Title 21 - FOOD AND DRUGS

- Contains nothing of substantial interest to the territories.
- * Contains matters of particular interest to the territories, but no legislative recommendations.
- ** Contains recommendations for changes in the law.
- (**) Contains recommendations for changes in the law, but the need for them is not urgent.

<u>Memorandum Number</u>	<u>Subject</u>	<u>21 U.S.C. sections</u>
21-1	* (a) Adulterated or Misbranded Foods or Drugs	16-25
	(**) (b) Teas	41-50
	- (c) Filled Milk	61-64
21-2	Animals, Meats, and Meat and Dairy Products	
	* (1) Importation of cattle and their quarantine	101-105
	* (2) Prevention of the introduction and spread of contagious diseases in animals and poultry	111-135b
	* (3) Importation of milk and cream	141-149
21-3	* (a) Viruses, Serums, Toxins, Anti- toxins, and Analogous Products	151-159
	- (b) Practice of Pharmacy and Sale of Poisons in Consular Districts in China	201-215
21-4	** The Federal Food, Drug, and Cosmetic Act	301-392
21-5	(**) (a) Poultry and Poultry Products Inspection	451-470
	(**) (b) Meat Inspection	601-695
21-6	** Drug Abuse Prevention and Control	801-970
21-7	* Egg Products Inspection	1031-1056

Title 21

21-8	(**) (a) Drug Abuse Prevention, Treatment, and Rehabilitation	1101-1181
	- (b) National Drug Enforcement Policy	1201-1204
	- (c) President's Media Commission on Alcohol and Drug Abuse Prevention	1301-1308

Memorandum No. 21-1
September 1987

- Subject: (a) Adulterated or Misbranded Foods or Drugs
Title 21, Chapter 1 (21 U.S.C. 16-25)
- (b) Teas
Title 21, Chapter 2 (21 U.S.C. 41-50)
- (c) Filled Milk
Title 21, Chapter 3 (21 U.S.C. 61-64)

Comment: The application to the territories of Chapter 1 of Title 21, although inexplicit, is probably clear enough as the law now stands. The application of Chapter 2, concerning the importation of spurious teas, is doubtful and ought to be corrected by an amendment making clear its application to the territories. The application to the territories of Chapter 3, concerning imitation milk, is unambiguous and requires no legislative attention.

Discussion: (a) Only a few sections remain in the chapter entitled Adulterated or Misbranded Foods or Drugs (21 U.S.C. 16-25), and while none expressly refers to any of the territories, it is probable that all are included within each of the sections. Interstate commerce in falsely labeled dairy or food products between any "State or Territory" or the District of Columbia, or within the District or any Territory, is prohibited (21 U.S.C. 16); the President may suspend "any importation . . . into the United States" of any adulterated article used for human consumption (21 U.S.C. 18); standard grades for apples are imposed for apples moving in interstate commerce, or "within the District of Columbia or the Territories" (21 U.S.C. 20); and imitation butter (such as oleomargarine) or cheese, although in interstate commerce, is made subject to the laws of "any State or Territory or the District of Columbia" to which it is brought (21 U.S.C. 25). These are all old laws, passed between 1890 and 1912, so the failure to specify the current territories, and the references only to "Territories," are understandable. The doctrine of Puerto Rico v. Shell Co. (302 U.S. 253 (1937)) would doubtless serve to make these laws applicable to the current territories. Provisions making these laws applicable to intraterritorial commerce would also apply to the current territories except for the Northern Marianas, with respect to which Federal control of intraterritorial commerce would be barred under

sections 105 and 502(a)(2) of the Covenant (unless the Northern Marianas were expressly named). Finally, in the absence of a definition, or of other constraining language, the "United States" for purposes of 21 U.S.C. 18 could be expected to include the territories.

The conclusions of the 1951 Commission on the Application of Federal Laws to Guam (H. Doc. 212, 82d Cong., p. 18) are consistent with the foregoing; those of the Virgin Islands Commission in 1956 are not (House Committee Print No. 7, p. 13), the Virgin Islands Commission having concluded that the laws in Chapter 1 of Title 21 were "of doubtful applicability . . . [and] should be made expressly applicable." (These laws have not been changed since 1956, so a conclusion of that date would be as valid today.) The reason for this conclusion is unstated. The Northern Marianas Commission on Federal Laws did not include Title 21 in its 1985 Report, but unpublished staff research for that Commission adopted the position of the Virgin Islands Commission--on the ground that nothing in the turn-of-the-century legislative history of these laws shows a Congressional intent to comprehend the unincorporated territories, or possessions. But because such a showing would not then have been possible (the doctrine of territorial incorporation having not yet been developed), the Guam Commission seems to have the better of the argument. It is reasonable to conclude, therefore, that these laws in Chapter 1 of Title 21 now apply to the territories (excluding only the intraterritorial aspect with respect to the Northern Marianas), and that they do not require legislative attention.

(b) The chapter on Teas (21 U.S.C. 41-50) contains provisions for the establishment of standards for the purity, quality, and fitness for consumption of tea, and makes it unlawful "to import or bring into the United States" any tea that does not meet those standards (21 U.S.C. 41). The term "United States" is undefined in the law, and in the pertinent regulations (21 CFR 1220.5-1220.76). The law was enacted originally in 1897, at which time a definition may have been viewed as unnecessary, but it has often been amended since--with no such definition added. Throughout the law there are references that seem to presuppose the existence of Federal Customs personnel at the port of importation, and that appear

to assume the existence of the usual Customs apparatus: e.g., a reference to the Tariff Schedules of the United States (21 U.S.C. 41); to the "customhouses" in the ports of New York, Chicago, San Francisco, and other "ports," as appropriate (21 U.S.C. 43); and to tea examiners and customs collectors (21 U.S.C. 44-46, 46a). These references suggest that tea imports into the territories, all of which are outside of the U.S. customs area, and none of which has Federal Customs collectors (except for the Virgin Islands, where they assist in the collection of territorial duties), were not intended to be covered by the law.

The three Federal laws commissions reached differing conclusions:

-- The Guam Commission (1951) found the law to be applicable to Guam and recommended that it continue to apply (H. Doc. 212, 82d Cong., p. 18). The Commission's staff had said that it "apparently" applied, that the Food and Drug Administration then (1951) agreed, and that the legislative history was "unclear" (Resource Material Used in the Preparation of the Report, House Interior Committee Print, 82d Cong., 1952, pp. 137-138).

-- The Virgin Islands Commission (1956) also concluded that the law applied to that territory, but recommended that it be made inapplicable to the Virgin Islands because "[t]ea used in the Virgin Islands is acquired from the United States, and is already subject to controls at the United States port of entry" (House Interior Committee Print No. 7, 84th Cong. (1956), p. 15). The recommendation was not acted upon.

-- The Northern Marianas Commission (1985) did not itself examine Title 21, but its unpublished staff research states that the references in the tea law to aspects of Federal customs law and apparatus

make clear that section 41 [of Title 21] prohibits the importation of substandard tea only into the customs territory of the United

States. Accordingly, section 41 does not apply to the importation of tea into the Northern Mariana Islands.

That view of the Northern Marianas Commission staff seems the most reasonable, and accordingly it would be sound to conclude that the law governing the importation of tea "into the United States" does not apply to any of the territories. Of course if tea is brought into the territories from the U.S. customs area, it will have been tested against applicable standards. But tea could easily be brought to the Pacific territories from the Far East or Asia, in which event protection for tea consumers may now be lacking. That being so, the amendment of this law, to make its application to the territories explicit, and to provide for enforcement (perhaps by territorial officers), would be desirable.

(c) The Filled Milk Act (21 U.S.C. 61-64), enacted in 1923, makes unlawful the shipment in interstate commerce of "filled milk," a term defined to mean milk, cream, or skim milk to which has been added any fat or oil other than milk fat, so that the result is an imitation (21 U.S.C. 61(c)). Such an imitation, the statute declares, is "adulterated," "injurious," and "a fraud upon the public" (21 U.S.C. 62). Under the language of the law, the territories are protected from this pernicious liquid. "Interstate commerce" includes the States, Territories, and possessions; and in addition, it is unlawful to manufacture filled milk "within any Territory or possession, or within the District of Columbia" (21 U.S.C. 62). The Virgin Islands, Guam, and Samoa are comprehended by both provisions. By operation of section 502(a)(2) of the Covenant, the Northern Marianas are covered by the interstate commerce provision (because it applies equally to Guam and the States), but not by the manufacture provision (which applies to Guam, but not to the States). But all of the foregoing is of historic interest only. In Milnot Co. v. Richardson, 350 F. Supp. 221 (D.C. Ill. 1972), the Filled Milk Act was held to be unconstitutional because it discriminates against the interstate shipments of filled milk products. The Department of Health and Human Services advises that on August 2, 1972, the Food and Drug Administration announced that it would not appeal the Milnot decision and would no longer enforce the Filled Milk Act (38 Fed. Reg. 20748).

Conclusion: The application to the territories of Chapter 1 (Adulterated or Misbranded Food or Drugs) is reasonably clear, and the application of Chapter 3 (Filled Milk) is wholly clear, but irrelevant. Chapter 2 (Teas) may or may not now apply to the territories, and because the subject is of some importance to them, an amendment to make the application certain would be desirable.

Federal agency comments: Comments were requested from the Food and Drug Administration (HHS) and the Department of Justice. All comments received are reflected above.

Subject: Animals, Meats, and Meat and Dairy Products
Title 21, Chapter 4

- (1) Importation of cattle and their quarantine (21 U.S.C. 101-105)
- (2) Prevention of the introduction and spread of contagious diseases in animals and poultry (21 U.S.C. 111-135b)
- (3) Importation of milk and cream (21 U.S.C. 141-149)

Purpose: To provide for the inspection and quarantine of animals imported or exported; to prevent the introduction and spread of diseases in livestock and live poultry; and to control the importation of milk and cream by a permit program, so as to exclude unfit milk or cream.

Territorial application: The laws contained in this chapter, excluding those at 21 U.S.C. 141-149 pertaining to the importation of milk and cream (which do not apply to the territories), are all now applicable to the territories--with minor exceptions, detailed below, that appear to pose no realistic problem.

Recommendation: The laws concerning the importation of cattle and their quarantine and the laws concerning the prevention of diseases in animals and poultry are not always on their face expressly applicable to the Virgin Islands, Guam, Samoa, and the Northern Marianas. But the Agriculture Department, which enforces these laws, has taken the position administratively that all such areas are covered by the laws as currently written, and in those circumstances further legislation is unnecessary on these subjects. The laws concerning the importation of milk and cream do not now apply to the territories, and need not.

Discussion: Chapter 4 of Title 21 is concerned with three subjects that appear separable, and each will be dealt with in turn.

(1) The sections that concern the importation of cattle and their quarantine (21 U.S.C. 101-105) all derive from a law originally enacted in 1890, so the failure of these sections to deal with the territories is not surprising. But one such section, 21 U.S.C. 104, in a later amendment (1956), makes express reference to the Virgin Islands; and none of the sections contains language that would exclude any of the territories; so one may reasonably conclude that all are covered by the sections in question.

More particularly,

21 U.S.C. 101 permits the President to suspend the "importation" (the law does not say to where) of animals, when that action is necessary to protect "animals in the United States," but the U.S. Department of Agriculture advises that in its view "importation" means importation into any part of the United States, including the Virgin Islands, Guam, Samoa, and the Northern Marianas;

21 U.S.C. 102 permits the Secretary of Agriculture to quarantine certain animals "imported into the United States";

21 U.S.C. 103 prohibits the "importation" of animals into any "port of the United States" not designated for that purpose by the Secretaries of Agriculture and the Treasury;

21 U.S.C. 104 prohibits the importation of certain diseased animals, or of certain animals exposed to diseases, but it permits an exception for "the admission from the British Virgin Islands into the Virgin Islands of the United States, for slaughter only, of cattle which have been infested with or exposed to ticks upon being freed therefrom"; and

21 U.S.C. 105 provides for the inspection of certain "imported animals" and of those "intended for exportation."

The Guam Commission in 1951 found these laws to be applicable to Guam and recommended that they continue to apply (H. Doc. No. 212, 82d Cong., p. 18); the Virgin Islands Commission in 1956 found them "of doubtful applicability" and recommended that they "be made expressly applicable" (House Interior Comm. Print No. 7, 84th Cong., p. 13); unpublished research of the staff of the Northern Marianas Commission (1985) agrees with the Guam Commission's conclusions. That research points out that 21 U.S.C. 104 should not have required amendment to provide for the Virgin Islands exception (enacted in 1955 and 1956) if the section were not already applicable to the Virgin Islands; that Guam's status parallels that of the Virgin Islands; and that the application of the law to the Northern Marianas under section 502(a)(2) of the Covenant necessarily follows. (And Samoa would be covered on the same rationale as Guam.) Internal references within these sections, and particularly in 21 U.S.C. 105, make clear that sections 101-105 all have the same geographic application.

The foregoing leads to the conclusion that sections 101-105 of Title 21 now apply to all of the territories.

(2) Sections 111-135b of Title 21, on the subject of the prevention of the introduction and spread of contagious diseases in animals and poultry have been enacted at various times over the last hundred years, and they vary in their geographic application. The sections likely to be of greatest interest in connection with the territories are discussed in turn below. None appears to require amendment.

21 U.S.C. 111 authorizes the Secretary of Agriculture to take action to prevent the introduction or spread of contagious diseases "from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another . . .". Because this law was first enacted in 1903, it could not have been expected to refer to the current territories, so the rule of Puerto Rico v. Shell Co. (302 U.S. 253 (1937)) would work to convert "Territory" to "territory," and all of the current territories would be comprehended. The Guam Commission reached that conclusion in 1951 (H. Doc. No. 212, 82d Cong., p. 19). The Virgin Islands Commission called attention to the express

exclusion of the Virgin Islands from 21 U.S.C. 111 with respect to live poultry, as provided in section 33 of the 1954 Revised Organic of the Virgin Islands (68 Stat. 497, 510; House Interior Comm. Print No. 7, 84th Congress, p. 26). (In the early 1950's, the Virgin Islands had experienced difficulty in importing poultry from the British Virgin Islands, causing the then Governor to complain that the Federal restrictions then imposed were illogical because "a sick chicken could fly from Tortola to St. Thomas." The Congress obliged with the 1954 exclusion.) But in 1956 the Virgin Islands' exemption was eliminated (by section 2 of the Act of January 28, 1956, 70 Stat. 5). The problem of the early 1950's has apparently not arisen again. In any event, all of the territories are now quite clearly comprehended by the authority contained in 21 U.S.C. 111.

21 U.S.C. 112, first enacted in 1884, requires the Secretary of Agriculture to investigate for the presence of communicable diseases in livestock or poultry "along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports" for exportation, and to issue appropriate regulations concerning their exportation or transportation. The language is broad enough to include all of the territories. The Guam Commission in 1951 agreed (H. Doc. 212, 82d Cong., p. 19), while the Virgin Islands Commission in 1956 expressed doubt and urged legislation making the section expressly applicable (House Interior Comm. Print No. 7, 84th Cong., p. 13). Such an amendment could not be hurtful, but does not appear necessary.

21 U.S.C. 113, first enacted in 1884, permits the Secretary of Agriculture to restrict the exportation of diseased livestock and poultry from "any port of the United States." The territories would be included. The positions of the Guam and Virgin Islands Commissions as to this section were the same as reported above as to 21 U.S.C. 112; unpublished research by the staff of the Northern Marianas Commission (1985) shows that it agreed with the Guam Commission's position.

21 U.S.C. 113a, enacted in 1948, authorizes the Secretary of Agriculture to establish research facilities, "in the United States or elsewhere" for the study of foot-and-mouth disease and other threatening animal diseases; and prohibits the introduction "into any part of the mainland of the United States" of the foot-and-mouth virus. Quite obviously, the territories are within the first quoted phrase but excluded from the latter. None of the territorial laws commissions have expressed concern over this exclusion, and 21 U.S.C. 114, discussed below, appears to overcome any problem created by it.

21 U.S.C. 114, enacted in 1884, requires the Secretary of Agriculture to issue regulations for the "suppression and extirpation of pleuropneumonia and other dangerous, contagious, infectious, and communicable diseases" and to communicate them to the governor "of each State and Territory." The section further provides for cooperation between the Secretary and each "State or Territory" that takes implementing action, and for Federal financial assistance. Given its date of enactment, the section's reference to a "Territory" would doubtless be construed to include each of the current "territories," under Puerto Rico v. Shell Co. (302 U.S. 253 (1937)).

21 U.S.C. 114a, dating from 1944, permits programs for the control and eradication of communicable diseases in livestock or poultry, with cooperation between the Secretary of Agriculture and the "States," among others; and that term is defined expressly to include the Territories and possessions. The territories are all clearly eligible for such programs.

21 U.S.C. 114e concerns the eradication of cattle grubs--a problem that territorial cattle may or may not have. But the program provided for in this 1948 law extends to the "Territories and possessions" (21 U.S.C. 114f), so no problem arises.

21 U.S.C. 114g deals with hog cholera, and its application is the same as that provided under 21 U.S.C. 114a

(above), so the territories are comprehended--should there be a need.

21 U.S.C. 115-116 concern the transportation by rail or water of diseased livestock or poultry "from one State or Territory to another," and because the sections derive from enactments of 1884 and 1920, respectively, they apply to the territories under Puerto Rico v. Shell Co. (302 U.S. 253 (1937)).

21 U.S.C. 118 places responsibility for the enforcement of various sections of the chapter in the U.S. Attorney, with jurisdiction in "any district court of the United States or Territorial court holden [sic] within the district in which such violation has been committed." This language could create a problem in Samoa, which has no U.S. Attorney, and which is not within any Federal judicial "district." The probability is that Samoa does not now present, and is unlikely in the foreseeable future to present, any real threat in the interstate transportation of diseased animals or poultry. It is unlikely that its livestock or live poultry would travel the considerable distance to any other part of the United States. In the circumstances, therefore, this deficiency in the law does not appear to require correction. The other territories have all the personnel and status necessary for purposes of 21 U.S.C. 118.

21 U.S.C. 120 directs the Secretary of Agriculture to issue regulations for the prevention of diseases in livestock and poultry by regulating the transportation "into and through any State or Territory . . . and to foreign countries." The authority extends to the territories.

21 U.S.C. 123-128 provide for the quarantine by the Secretary of Agriculture of "any State or Territory . . . or any portion of any State or Territory," when he determines that diseased animals or poultry are within its borders (21 U.S.C. 123). The sections cited, all of which relate to animal quarantine, were first enacted in 1905 or 1914, and thus the rule of Puerto Rico v. Shell Co. would serve to make them all applicable to the current territories.

21 U.S.C. 134-134h provide authority to the Secretary of Agriculture for a program of seizure, quarantine, and disposal of diseased livestock or poultry in interstate or foreign commerce. The term "United States" expressly includes Guam and the Virgin Islands (21 U.S.C. 134(c)), and because this law was enacted in 1962, it would apply to the Northern Marianas as well under section 502(a)(2) of the Covenant. Only Samoa, therefore, seems open to question, but the Agriculture Department advises informally that it would regard Samoa as within the "United States" for purposes of these laws as well. If need be, the Department could act under other authority (such as 21 U.S.C. 211), but the matter appears now to be inconsequential, owing to Samoa's distance from the mainland and to its modest animal population. In any event, given the expansive language that appears in the 1962 law (e.g., diseased animals "on any premises in the United States" or "anywhere in the United States" (21 U.S.C. 134a(b))), there would appear to be an entirely rational basis for including Samoa by administrative action--were it to present a genuine problem of dissemination of communicable animal diseases.

21 U.S.C. 135 and 135a represents something of a curiosity for the territories. Both sections were enacted in 1970. The first such section authorizes the Secretary of Agriculture to establish an international quarantine station, through which animals from foreign countries, which might otherwise be denied entry because of animal diseases or pests, may enter the United States and be moved to other parts of the United States, under controls established by the Secretary. The legislative history indicates that the law has a two-fold purpose: to permit the entry of livestock from foreign points, when it may be used to improve the quality of domestic livestock, but to do so under controlled conditions so as not to risk the spread of animal diseases or pests (1970 U.S. Code Cong. and Admin. News 2968). Congress anticipated that the international quarantine station would be located in the Caribbean, and it was in fact established in Key West, Florida.

The second section, 21 U.S.C. 135a, provides in subsection (a):

The provisions and penalties of section 545 of Title 18 shall apply to the bringing of animals to the quarantine station or the subsequent movement of animals to other parts of the United States, including Puerto Rico, Guam, and the Virgin Islands, contrary to the conditions prescribed by the Secretary in regulations issued hereunder.

Section 545 of Title 18, in turn, deals with "Smuggling goods into the United States," and provides criminal penalties for the smuggling or clandestine introduction "into the United States" of merchandise contrary to the customs laws. The section expressly exempts from the definition of "United States" for purposes of 18 U.S.C. 545 a number of areas, all of which are outside the U.S. customs area, and among those exempted are the Virgin islands, American Samoa, and Guam. (This matter is discussed further in Memorandum No. 18-1, where it is concluded that an exemption for the Northern Marianas--also outside the U.S. customs area--should be obtained as well.)

Conveniently, the pertinent committee of the Congress was aware of this exemption for the territories when the law that became 21 U.S.C. 135a was before it, and for that reason the section was made expressly applicable to the Virgin Islands (1970 U.S. Code Cong. and Admin. News 2975). The readily available legislative history makes no reference to Guam, but it was added also--so the language of 21 U.S.C. 135a(a) makes clear that both the Virgin Islands and Guam are subject to 18 U.S.C. 545, so far as it relates to animals brought to the international quarantine station that are "subsequently moved" to the Virgin Islands or Guam. (The realistic effect would seem to be that an animal from a foreign source, if accepted at the quarantine station, could be moved to the Virgin Islands or Guam only under such controls as might be established by the Secretary of Agriculture. The animal could not be moved to either territory without regard to those controls, and a rejected animal could not be "smuggled" into either territory.)

American Samoa does not appear to be covered by either 18 U.S.C. 545 or 21 U.S.C. 135a--but that probably presents no realistic problem, for Samoa's livestock industry is neither substantial nor a product of advanced technology. If a practical problem were to arise in connection with American Samoa, the Agriculture Department believes it would have authority to impose appropriate controls under other laws, including 21 U.S.C. 111. The Northern Marianas is now covered by both sections. And if it is excluded from 18 U.S.C. 545 by an amendment, as recommended in Memorandum No. 18-1 of this study, then 21 U.S.C. 135a(a) would continue to apply to it, by operation of section 502(a)(2) of the Covenant. That is so because 21 U.S.C. 135a applies equally to Guam and the States.^{1/}

In sum, the language of 21 U.S.C. 135 and 135a does not require modification.

(3) The third and final subject covered by Chapter 4 of Title 21 is the importation of milk and cream (21 U.S.C. 141-149). These sections, enacted in 1927, provide that milk and cream may be imported "into the United States" only on the basis of a permit issued by the Secretary of Health and Human Services (21 U.S.C. 141), and it stipulates standards for the determination of whether milk and cream is fit for importation (21 U.S.C. 142). The "United States" for purposes of this law is defined to exclude all of the territories (21 U.S.C.

^{1/} The naming of Puerto Rico in 21 U.S.C. 135a(a), as an area to which that section applies, appears to have been unnecessary. The House Agriculture Committee, in considering the legislation that became 21 U.S.C. 135a, believed that 18 U.S.C. 545 might not apply to Puerto Rico because that result is not expressly stated in that section. So the Committee provided for Puerto Rico's express inclusion in 21 U.S.C. 135a (1970 U.S. Code Cong. and Admin. News 2975). But Puerto Rico does not join other offshore areas in being made expressly exempt from 18 U.S.C. 545, doubtless because Puerto Rico--unlike the rest--is within the "United States" for customs purposes. Additionally, it is within the "United States" generally for purposes of Title 18 (18 U.S.C. 5). In any event, the only result as to Puerto Rico is redundancy--besides which, Puerto Rico is beyond the scope of this study anyway.

149(b)), so that milk or cream may be imported into them without regard to the protections afforded by this law. (The history of the definition of "United States" shows that the Territory of Alaska was at all times included within the term, but the Territory of Hawaii was not. Alaska and Hawaii are now covered, inasmuch as the definition now includes "the fifty States and the District of Columbia.")

This exclusion was untroublesome to the Guam Commission in 1951 and to the Virgin Islands Commission in 1956, both of which concluded that the law did not then apply to the territory in question and that it should remain inapplicable (H. Doc. 212, 82d Cong., p. 30 and Interior Comm. Print No. 7, 84th Cong., p. 26, respectively). The rationale for these conclusions is lost in history. In unpublished research for use of the Northern Marianas Commission in 1985, its staff adopted the same position, on the ground that other regulations of the Food and Drug Administration afford sufficient protection to the people of the Northern Marianas.

Inasmuch as there has been no known request over these many years for the extension of this law to any of the territories, and inasmuch as its extension would probably involve Federal administrative machinery in each area that does not now exist and that would almost certainly prove costly, it seems reasonable to conclude that this law may, without risk of serious injury, remain inapplicable to the territories.

Conclusion: The application to the territories of the laws in Chapter 4 of Title 21 is clear at this time, given the Department of Agriculture's position that the territories are within the "United States" for purposes of these laws--except for the laws at 21 U.S.C. 141-149 pertaining to the importation of milk and cream. They do not apply to the territories and they need not do so.

Federal agency comments: Comments were requested from the Departments of Agriculture, Health and Human Services (Food and Drug Administration), and Justice. All comments received have been reflected above.

Subject: (a) Viruses, Serums, Toxins, Antitoxins, and Analogous Products
Title 21, Chapter 5 (21 U.S.C. 151-159)

(b) Practice of Pharmacy and Sale of Poisons in Consular Districts of China
Title 21, Chapter 7 (21 U.S.C. 201-215)

Comment: Chapter 5 is largely applicable to the territories at this time. Neither chapter discussed below requires any modification to accommodate the territories.

Discussion: (a) Chapter 5, entitled Viruses, Serums, Toxins, Antitoxins, and Analogous Products (21 U.S.C. 151-159), provides for the regulation of viruses, serums, and related products for use in the treatment of domestic animals. It is unlawful to sell "in the Territories, or in any place under the jurisdiction of the United States," or to ship or deliver in or from "the United States . . . any territory of the United States, or any place under the jurisdiction of the United States" a virus, serum, or related product that is worthless, contaminated, dangerous, or harmful (21 U.S.C. 151). The Act from which the section is derived was enacted in 1913, which accounts for the reference in the phrase first quoted above to "Territories"; it was amended in 1985 (by section 1768(a) of the Food Security Act of 1985, 99 Stat. 1354, 1654) by the addition of the second quoted phrase, with its reference to "territory." Although the readily available legislative history is silent as to the rationale for the addition (1985 U.S. Code Cong. and Admin. News 1103), the new language fortifies the conclusion that this section applies to the territories here involved. Other sections of the chapter control the importation "into the United States" of viruses and serums (21 U.S.C. 152); authorize the Secretary of Agriculture to inspect viruses and serums being "imported . . . into the United States" (21 U.S.C. 153); authorize the Secretary to issue regulations and licenses concerning the preparation, sale, and shipment of these products (21 U.S.C. 154); and permit inspections of manufacturing establishments (21 U.S.C. 156, 157).

All of the foregoing sections apply to all of the territories. The Federal Laws Commissions for Guam (1951) and the Virgin Islands (1956) agreed (H. Doc. No 212, 82d Cong., p. 19; House Interior Comm. Print No. 7, 84th Cong., p. 20). Unpublished staff research for the Northern Marianas Commission (1985) reaches the same result, based on the operation of section 502(a)(2) of the Covenant.

But one section codified in this chapter--21 U.S.C. 154a, derived from section 1768(c) of the Food Security Act of 1985 (99 Stat. 1354, 1654)--pertains only to the "States," and the term is not defined for purposes of the section. The section is intended to meet "an emergency condition, limited market or local situation, or other special circumstances," and permits in that situation an expedited procedure for a special license. The section also permits the Secretary to waive the license requirement in special circumstances, including distribution in a State that has its own adequate regulatory program. This authority under 21 U.S.C. 154a does not extend to the territories. In light of the modest animal industry in them all, this result is probably untroublesome. No territory has been heard to express concern on the point. It seems appropriate, therefore, to refrain from recommending correction.

(b) The Practice of Pharmacy and Sale of Poisons in Consular Districts in China (21 U.S.C. 201-215), a 1915 law, deals with the licensing by a U.S. consul of persons "whose permanent allegiance is to the United States" and who practice pharmacy in China, and with regulating their professional activities. The law dates from the age when the United States, and others, exercised extra-territorial rights in China, and it is long since obsolete. The Food and Drug Administration so advised the Guam Commission in 1951, and the law has grown the more so since.

Conclusion: The laws considered above require no change.

Federal agency comments: Comments were requested from the Department of Agriculture and the Department of Justice. All comments received have been reflected above.

Subject: The Federal Food, Drug, and Cosmetic Act
Title 21, Chapter 9 (21 U.S.C. 301-392)

Purpose: To protect consumers from any food, drug, device, or cosmetic that is adulterated or misbranded.

Territorial Application: The Act applies as fully to the Virgin Islands, Guam, American Samoa, and the Northern Marianas as it does to the States--and in one instance, discussed below, more stringently as to the first three territories. Enforcement in Samoa, however, is uncertain and should be clarified.

Recommendation: The Act should be amended to make clear that the High Court of American Samoa is a "United States court of a Territory" for purposes of enforcement. Additionally, the section concerning the regulation of imports should be clarified to make more certain its application to the territories.

Discussion: The Federal Food, Drug, and Cosmetic Act, enacted in its current form in 1938 but often amended since, constitutes a major public health statute that is of great importance to consumers in the territories, as elsewhere in the United States. Its provisions are long and detailed, but it may be sufficient for current purposes to state simply that it is designed to protect the Nation's health against impure and unsafe foods, drugs, devices, and cosmetics. The Act is administered by the Food and Drug Administration, an agency of the Department of Health and Human Services.

Because of the broad definitions it contains, it is clear that the Act applies to all of the territories:

-- The term "State" includes any "Territory" (21 U.S.C. 321(a)(1));

-- The term "Territory" means any Territory or possession (21 U.S.C. 321(a)(2)); and

-- The term "interstate commerce" means commerce "between any State or Territory and any place outside thereof" (21 U.S.C. 321(b)). (The term also means "commerce within the District of Columbia or within any other Territory not organized with a legislative body," but the four territories here involved have legislative bodies, so that intra-territorial provision would not apply to any of them.)

Those definitions led the Guam Commission on the Application of Federal Laws (1951) to conclude that the Act applied to Guam (H. Doc. 212, 82d Cong., p. 19); the Virgin Islands Commission (1956) reached the same conclusion as to that territory (House Interior Comm. Print No. 7, 84th Cong., p. 20); and unpublished research of the staff of the Northern Marianas Commission (1985) shows the same result, based upon the operation of section 502(a)(2) of the Covenant, which provides for the application to the Northern Marianas of laws in effect in Guam prior to January 9, 1978, "as they are applicable to the several States."

The Act does, however, present a problem of court jurisdiction in Samoa; and it also contains some other results that are worthy of comment. These are discussed in turn.

As to jurisdiction for enforcement in American Samoa, the Act refers to district courts of the United States "and the United States courts of the Territories" (sometimes in the singular), at 21 U.S.C. 332(a), 334(a)(1) and (2). The Virgin Islands, Guam, and the Northern Marianas all have district courts with "the jurisdiction of a District Court of the United States" (48 U.S.C. 1612(a), 1424(b), 1694a(a)), so no question is presented as to them. But there is no Federal District court with jurisdiction in Samoa, and it is not entirely clear that the High Court of American Samoa constitutes one of the "United States courts of the Territories." The High Court was originally an administrative creation of the Secretary of the Navy, later perpetuated by the Secretary of the Interior. It is now provided for by the local Constitution of American Samoa, and that Constitution has been given recognition by the Congress (48 U.S.C. 1662a), but the High Court was not created by the Congress.

This question was presented to the Interior Department by the Food and Drug Administration in June 1985 (in connection with inadequate screening of blood donors in Samoa) and again in February 1986. In an opinion dated May 14, 1986, Interior's Acting Associate Solicitor stated that the Food, Drug, and Cosmetic Act applies to American Samoa; that in 1968 the Congress added the reference to "United States court of a Territory," at a time when Samoa was the only area that might have been covered by those words, for all other territories then had Federal District Courts; that there is no legislative history on the particular point; and that it should be supposed that Congress would not have made the Act applicable in Samoa without providing a court for enforcement. The opinion thus concludes that the High Court of American Samoa is a "United States court of a Territory" for purposes of enforcement of the Act. But it also suggests that "to forestall future legal challenges," the Congress should be asked to amend the law to eliminate any question of the High Court's jurisdiction.

No such legislative effort has yet been made. The Food and Drug Administration reports informally that the blood bank problem that gave rise to its original question was resolved administratively, so there has been no court test.

In the circumstances, an express amendment to the Federal Food, Drug, and Cosmetic Act should be sought--perhaps by adding a definition at 21 U.S.C. 321 stating that the term "United States court of a Territory" includes the High Court of American Samoa.

As to other results of the Act, three are worthy of comment here.

(1) In several instances, the Act provides for appeals with respect to orders or regulations of the Commissioner of Food and Drugs or the Secretary of Health and Human Services: 21 U.S.C. 346a(i), 348(g)(1), 355(h), and 360g(a). In all of the foregoing, appeals may be taken to the Court of Appeals for the circuit in which the person resides

or has his business, or to the U.S. Court of Appeals for the District of Columbia. The latter court would provide a forum for a person in Samoa, which is not within any Court of Appeals circuit, in the unlikely event that such Samoan were to want it. But one provision of the Act, 21 U.S.C. 371(f), provides for an appeal from an order without mention of the Court of Appeals for the District of Columbia. This may be a legislative oversight, and in any event, it is unlikely to pose a realistic problem to anyone in Samoa. But if legislation is sought to achieve the more important result discussed above--making clear that the High Court of Samoa has enforcement jurisdiction--then this minor point in 21 U.S.C. 371(f) might be corrected at the same time.

(2) Among the "prohibited acts" that the Act defines as a Federal crime is

The manufacture within any Territory of any food, drug, device, or cosmetic that is adulterated or misbranded. (21 U.S.C. 331(g)).

It will be remembered that the term "Territory" includes any "possession" (21 U.S.C. 321(a)(2)), on which basis the Virgin Islands, Guam, and American Samoa--and the Northern Marianas by operation of section 502(a)(2) of the Covenant--are generally covered by the Act.

The provision at 21 U.S.C. 331(g), however, which is intended to control intra-territorial activity with respect to the manufacture of adulterated or misbranded products, applies to the Virgin Islands, Guam, and Samoa, but not to the Northern Marianas. This result follows from the language of section 502(a)(2) of the Covenant, which provides that laws enacted prior to January 9, 1978, that apply to Guam apply as well to the Northern Marianas, but only "as they are applicable to the several States." Inasmuch as the Food, Drug, and Cosmetic Act does not provide for the regulation of intra-State commerce (except with respect to oleomargarine, mentioned below), intra-territorial commerce in the Northern Marianas is also exempt. Hence, the act defined at 21 U.S.C. 331(g) would not constitute a crime in the Northern Marianas.

Oleomargarine, however, is treated differently. Although the Federal Food, Drug, and Cosmetic Act for the most part provides for the regulation of covered articles in interstate commerce, and to a limited extent, as explained above, articles manufactured in intraterritorial commerce, oleomargarine "sold in the same State or Territory in which it is produced" is treated as though it were "in interstate commerce" (21 U.S.C. 347(a)). Hence, oleomargarine in intrastate commerce or in intraterritorial commerce, including commerce wholly within the Northern Marianas, is subject to regulation under the Act.

(3) The Federal Food, Drug, and Cosmetic Act deals with "food, drugs, devices and cosmetics which are being imported . . . into the United States" (21 U.S.C. 381). The term "United States" is not defined for purposes of the Act. It is defined, for purposes of one subsection only, to mean the States and the District of Columbia (21 U.S.C. 372(a)). (That subsection provides for the inspection in the States or the District of Columbia, as the first "point of entry," of food "packed" in Puerto Rico or in a territory.) Because other terms are defined for purposes of the Act generally so as to include the territories that are the subject of this study (i.e., "State," "Territory," and "interstate commerce," 21 U.S.C. 321(a)(1), (a)(2), and (b)), it would seem reasonable to construe the "United States" in 21 U.S.C. 381 to do so as well. In that event, imports into the territories would be subject to the same regulation as are imports into the States.

A difficulty arises, however, from the fact that the Secretary of the Treasury (as overseer of the Customs Service) is central to the administration of the provisions at 21 U.S.C. 381. Inasmuch as the U.S. customs area includes the States and Puerto Rico, but none of the territories here involved, perhaps one may infer that the territories are not intended to be covered by the import provisions. But no words of the law say that, and the particular definition for the limited purpose of 21 U.S.C. 372(a) argues, by implication, against it. In addition, the Secretary of Health and Human Services may, under 21 U.S.C. 372(a), utilize the services of any health, food, or drug officer "or employee" of any of the

territories in conducting examinations and investigations under the Act, so a means exists by which the import restrictions could be administered in the territories.

In the circumstances, it seems reasonable to conclude that the import restrictions apply to the territories, and may be enforced there through administrative arrangements under 21 U.S.C. 372(a). But clarification of these results through additional legislation could prove helpful.

In its comments on these Title 21 memoranda, the Department of Health and Human Services has observed that such a clarifying amendment would do no harm, but it also says that it is "confident" that its construction of the term "United States" (to include the territories for the purposes of the import restrictions) is sound, and that such an amendment would therefore be unnecessary.

Conclusion: The Federal Food, Drug, and Cosmetic Act should be amended to make clear that the High Court of American Samoa is a "United States court" of a territory, for purposes of enforcement of the Act. And the section providing for the regulation of imports should be clarified by defining the "United States" to include the territories. A minor correction, to add the Court of Appeals of the District Columbia to one section, might also be accomplished at the same time, to meet an entirely hypothetical need in Samoa.

Federal agency comments: Comments were requested from the Department of Health and Human Services and the Department of Justice. All comments received have been reflected above.

Memorandum No. 21-5
November 1987

Subject: (a) Poultry and Poultry Products Inspection
Title 21, Chapter 10 (21 U.S.C. 451-470)

(b) Meat Inspection
Title 21, Chapter 12 (21 U.S.C. 601-695)

Comment: The poultry inspection laws are largely applicable to the four territories, but they contain deficiencies with respect to American Samoa (because it is not an "organized territory"), and with respect to other obsolete references to "Territories." These deficiencies ought to be corrected, but there is no known urgency in doing so, owing to limited poultry processing in the territories. The meat inspection laws, similarly, are generally applicable to the territories, but they too contain technical deficiencies that should be corrected when convenient.

Discussion: (a) The laws concerning Poultry and Poultry Products Inspection (21 U.S.C. 451-470) apply for the most part to the Virgin Islands, Guam, Samoa, and the Northern Marianas as they apply to the States--although they contain minor imperfections that ought to be eliminated when a convenient legislative opportunity arises. These laws provide for the inspection of poultry and related products in plants that ship in interstate commerce (21 U.S.C. 455), and for Federal assistance through the Secretary of Agriculture to States and "organized" territories in the development, administration, and financing of State or territorial poultry product inspection laws (21 U.S.C. 454). The laws are intended generally to protect the consumer from adulterated or misbranded poultry products (21 U.S.C. 451, 452). Imports "into the United States" must meet the same standards with respect to quality and labeling (21 U.S.C. 466).

As modified in 1968, the definitions contained in the poultry inspection laws are largely suitable for current purposes:

"commerce" means commerce between any State, the District of Columbia, and "any territory . . . and any place outside thereof," as well as "within any territory not organized with a

legislative body" (21 U.S.C. 453(a))--of which there are none among those that are the subjects of this study;

"territory" means Guam, the Virgin Islands, Samoa, and "any other territory or possession" (21 U.S.C. 453(c)), and because the definition was enacted in 1968, the Northern Marianas are also included by operation of section 502(a)(2) of the Covenant; and

"United States" includes the "territories" (21 U.S.C. 453(d)).

A further definition for purposes of the section that provides for Federal and State cooperation (21 U.S.C. 454), provides that "State" includes an "organized territory" (21 U.S.C. 454(d)).

Poultry is raised and slaughtered in all of the territories, but no territory has a commercial processing plant for poultry, nor does any territory currently ship poultry outside its borders. Consequently, the impact of the poultry inspection laws upon the territories at this time is minimal--but there is value in the fact that, if circumstances should change, under existing law the Secretary of Agriculture is fully authorized to carry out the same program in the Virgin Islands, Guam, and the Northern Marianas as is authorized in the States. Existing law provides an exemption for poultry producers with respect to poultry raised on their own farms, (i) if not more than 1000 poultry in the calendar year are slaughtered, (ii) if the farmer does not otherwise engage in the poultry business, and (iii) if he does not sell outside the State or territory (21 U.S.C. 464(c)(4)). It is probable that there are few, if any, poultry producers in the territories who do not qualify for that exemption.

While the Virgin Islands, Guam, and the Northern Marianas appear to be comprehended appropriately by the poultry inspection laws, for both present and potential future

purposes, that is not true of Samoa. Although the general definitions cited above include Samoa (for purposes of "commerce," "territory," and "United States"), and although the court jurisdiction provision for purposes of enforcement expressly includes "the highest court of American Samoa" (21 U.S.C. 467c), other sections are deficient for Samoa's purposes. For example, the United States Attorney is to institute criminal proceedings (21 U.S.C. 462), and none exists with responsibility for Samoa; references to the United States Court of Appeals (at 21 U.S.C. 457(d) and 467) are inapropos, for no Court of Appeals has jurisdiction over Samoa as such; and the definition cited above for purposes of cooperation between the Federal and territorial governments does not comprehend Samoa. That definition provides that "State" means an "organized territory" (21 U.S.C. 454(d)), and an "organized" territory is understood to be one with an organic act enacted by the Congress (U.S. v. Standard Oil Co., 404 U.S. 558 (1972)). Although Samoa's local constitution--which fulfills many of the purposes of an organic act--has been recognized by the Congress (e.g., 48 U.S.C. 1662a), no court has yet held that Samoa is an "organized" territory. (That result would not be unreasonable, but it has not yet been reached.) To insure Samoa's inclusion, thus, in the cooperation provisions of 21 U.S.C. 454, a revision of the definition at (d) is necessary.^{1/}

^{1/} The term "organized territory" also appears at 21 U.S.C. 460(e), where the Secretary of Agriculture is authorized to take actions with respect to persons in the intrastate poultry business in "any State or organized territory," if the laws of the State or territory are deficient. In this instance, too, Samoa's inclusion is at best arguable. As to the Northern Marianas, no question should exist. Although the Northern Marianas do not have a traditional organic act, and thus may not under a strict construction be viewed as an "organized territory," these laws apply to the Northern Marianas as they apply to Guam (unarguably an "organized territory") pursuant to section 502(a)(2) of the Northern Marianas Covenant. It will be noted that, as mentioned above, the definition of "commerce" at 21 U.S.C. 453(a) includes commerce "within any territory not organized with a legislative body"; and it is stated above that the Virgin Islands, Guam, Samoa, and the Northern Marianas are not within that language. Each has an elected legislative body, "organized" pursuant to organic acts (continued...)

Additionally, the poultry inspection laws contain numerous references to "States and Territories," or variations thereof--i.e., 21 U.S.C. 454(a)(2), 464(b), 464(c)(1)(C), 464(c)(2), 467a, and 467e. The term "Territory" would almost certainly be construed to mean "territory," under the rationale of Puerto Rico v. Shell Co. (302 U.S. 253 (1937)), particularly given the 1968 amendments that cite most of the territories explicitly. But such references to "Territories" are not only obsolete, but also inconsistent with such 1968 definitions. So confusion could be avoided if they too were updated.

In light of the limited poultry inspection task now presented in the territories, the need for such technical improvements is not urgent, but it should be accomplished when it is reasonably convenient to do so.

(b) The Meat Inspection laws (21 U.S.C. 601-695) provides for the Federal inspection of meats--principally cattle, sheep, swine, and goats--and impose labeling requirements, so as to assure consumers that the meat and meat products distributed to them are "wholesome, not adulterated, and properly marked, labeled, and packaged" (21 U.S.C. 602). Inspection is authorized both before and after slaughter (21 U.S.C. 603, 604); animals, meat, and meat products proposed for export are subject to inspection (21 U.S.C. 612-617); and meat and meat products imported must meet the same standards as are required in commerce "within the United States" (21 U.S.C. 620). There are several statutory

1/ (...continued)

(in the case of the Virgin Islands and Guam), or pursuant to local constitutions (in the case of the Northern Marianas and Samoa). So all four areas should be excluded from the quoted phrase. But that phrase is unusual in Federal statutes and is not a phrase of art--in the sense that "organized territory" is a phrase that has been given judicial construction. Accordingly, "not organized with a legislative body" appears to have a meaning that differs from "organized territory." Samoa ought reasonably to be viewed as being "organized with a legislative body," even though it is not an "organized territory."

exemptions, however, from the inspection requirements that apply to "establishments" that slaughter animals and prepare meat and meat products "for commerce"; and among them is an exemption for a person who slaughters "animals of his own raising" and prepares them "for use by him and members of his household and his nonpaying guests and employees" (21 U.S.C. 623(a)). That exemption would apply to most animal processing in the territories.

The meat inspection laws, like the poultry inspection laws discussed immediately above, are applicable to the territories generally, but some of the same technical deficiencies appear in both. They are applicable generally to the Virgin Islands, Guam, American Samoa, and the Northern Marianas in light of broad definitions:

"Territory" means Guam, the Virgin Islands, American Samoa, and "any other territory or possession of the United States" (21 U.S.C. 601(g))--so the Northern Marianas, under this definition enacted in 1967, are also included by operation of section 502(a)(2) of the Covenant; and

The "United States" includes the "Territories" (21 U.S.C. 601(i)).

But the term "organized Territory" also appears: at 21 U.S.C. 624 (which permits the Secretary of Agriculture to provide an exemption for "any retail store or other establishment in any State or organized Territory" if storage and handling are adequately regulated under the laws of the State or Territory); at 21 U.S.C. 645 (which permits Federal inspection of businesses engaged in slaughtering or preparing meat products "in any State or organized Territory," even if those activities are not "in commerce," if regulation by the State or Territory is inadequate); and at 21 U.S.C. 661 (which provides for Federal-"State" cooperation, and for Federal technical and financial assistance to "States," with that term being defined for purposes of the section as including any "organized Territory" (21 U.S.C. 661(d)). As explained in

connection with the poultry inspection laws above, Samoa may not be--and has not been viewed by any court as being--an "organized Territory" (or "organized territory"). The limited animal slaughtering and meat processing now conducted in Samoa renders the matter nonurgent, but it would be well to eliminate the problem--perhaps merely by eliminating the adjective "organized"--so as to insure Samoa's full inclusion in all parts of these laws. The fundamental Congressional intent was surely to include Samoa in the meat inspection laws, as evidenced by the conferring of enforcement jurisdiction upon, among others, the "highest court of American Samoa" (21 U.S.C. 674), so such a perfecting change would be consistent with that intent. Although the Northern Marianas are also probably not an "organized" territory in the traditional sense, they are currently covered by the provisions in question because the meat inspection laws are applicable to Guam and the States and, under section 502(a)(2) of the Northern Marianas Covenant, they thus become applicable to the Northern Marianas "as they are applicable to the several States."

A further, very minor shortcoming appears at 21 U.S.C. 671(a), where the Secretary of Agriculture may deny inspection services to one who has been convicted of violating certain laws "in any Federal or State court." Inasmuch as the term "State" means a State or Puerto Rico only (21 U.S.C. 601(f)), conviction in a territorial court would appear not to be a basis for a decision that the person is unfit. The defect may not now be material as a factual matter, but it too warrants correction when the meat inspection laws are otherwise perfected for the purposes of the territories.

Conclusion: The poultry and meat inspection laws are largely applicable now to all of the territories, but each contain technical deficiencies, particularly as to American Samoa, that ought to be corrected when a convenient legislative vehicle is available--and in any event before poultry and meat processing become significant territorial activities.

Federal agency comments: Comments were requested from the Departments of Agriculture and Justice. All comments received have been reflected above.

Subject: Drug Abuse Prevention and Control
Title 21, Chapter 13 (21 U.S.C. 801-970)

Purpose: To regulate and control the manufacture, distribution, and possession of controlled substances and narcotic drugs, in both interstate and intrastate commerce, and to regulate their importation and exportation.

Territorial application: These Federal drug laws, which constitute the bulk of the Comprehensive Drug Abuse and Control Act of 1970, apply fully to the Virgin Islands, Guam, American Samoa, and the Northern Marianas, but the jurisdiction of the High Court of American Samoa with respect to prosecution for violations of the Act is uncertain.

Recommendation: The jurisdiction of the High Court of American Samoa with respect to offenses under the Comprehensive Drug Abuse and Control Act should be made certain, perhaps by defining "court of the United States" and "district court of the United States" for purposes of the Act to include the Samoan High Court.

Discussion: The Comprehensive Drug Abuse Prevention and Control Act of 1970 contains both the Controlled Substances Act (21 U.S.C. 801-904) and the Controlled Substances Import and Export Act (21 U.S.C. 951-970). These Acts require that those who manufacture, distribute, dispense, import, or export a controlled substance must register with the U.S. Attorney General, and criminal penalties attach to those actions or to possession of a controlled substance in the absence of registration. For purposes of these Acts, the terms "United States" and "State" include the four territories here involved:

-- The "United States" when used in a geographical sense means all places "subject to the jurisdiction of the United States" (21 U.S.C. 802(28), 951(b)), a phrase that includes not only the territories but also the Trust Territory of the Pacific Islands (U.S. v. Perez, 769 F.2d 1336 (1985)); and

-- The term "State" includes "any State, territory, or possession . . . [and] the Trust Territory of the Pacific Islands" (21 U.S.C. 802(26)).

These terms are used frequently throughout the chapter, and there can be no doubt that the territories are thus fully covered. The registration requirements and other controls imposed with respect to the manufacture, distribution, and possession of controlled substances and narcotic drugs are, therefore, as fully in effect in the territories as in the States--and that is true of intrastate (i.e., intraterritorial) activity, as well as interstate (or State-to-territory) activity (21 U.S.C. 801(5), (6)).

Equally, the territories are all within "the United States" for purposes of the import controls: It is unlawful to import controlled substances or narcotic drugs

into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof . . . (21 U.S.C. 952(a)).

There are exceptions, not now relevant, and there are provisions for the registration of importers (21 U.S.C. 957).

The four territories here involved--the Virgin Islands, Guam, Samoa, and the Northern Marianas--are all outside the U.S. customs area, but otherwise within the "United States" for purposes of the import language quoted above. (The definition of "United States" as including all areas subject to its jurisdiction, 21 U.S.C. 802(28), is incorporated by reference at 21 U.S.C. 951(b) for purposes of the import provisions.) The effect of the language quoted above from 21 U.S.C. 952(a) is therefore not only to prohibit imports of controlled substances and narcotic drugs into the territories "from any place outside thereof," but also to prohibit such imports into the U.S. customs area (the States, the District of Columbia,

and Puerto Rico) from any of the territories. Additionally prohibited would be any imports into a territory from another territory or from one of the States, inasmuch as that could not be done without traversing international waters. U.S. v. Perez, 709 F.2d 1336 (1985), so holds in the case of a shipment of marihuana from Rota to Guam, a distance of 31 nautical miles. (The Compact of Free Association Act of 1985, Public Law 99-239, makes express provision for cooperative enforcement of laws pertaining to controlled substances in the Federated States of Micronesia (section 102(a)(1)(B)) and the Marshall Islands (section 103(a)(1)(B)). Legislation looking toward a Compact with Palau (Public Law 99-658) incorporates this requirement by reference (section 101(d)(1)(C)).)

There remains the problem of court jurisdiction in American Samoa--a problem made larger by uneven references to court jurisdiction throughout the Controlled Substances Act. For particular purposes under the Act, reference is sometimes made to a District Court of the United States (e.g., 21 U.S.C. 842(c)(1), 853(1), 881(b), 884(b)), and sometimes to a "court of the United States" (e.g., 21 U.S.C. 849(a), 850, 876(c), 884(b), 969); and one section works in references to both (21 U.S.C. 884(b)). There should be no doubt that the District Courts of the Virgin Islands, Guam, and the Northern Marianas are comprehended by these phrases and by the foregoing sections, inasmuch as each has "the jurisdiction of a District Court of the United States" (48 U.S.C. 1612(a), 1424(b), 1694a(a)). But that is not true of Samoa, where no U.S. District Court has jurisdiction, and where the High Court has not been created by the Congress or vested with Federal jurisdiction. Nor is there a U.S. Attorney with responsibility in Samoa, and that officer is given particular responsibilities under the Controlled Substances Act (e.g., 21 U.S.C. 849(a), 851). Accordingly, there is substantial doubt --and it should be eliminated--as to whether the High Court of Samoa constitutes either a District Court of the United States or a court of the United States, when either of those phrases appear in the Controlled Substances Act. The definitions quoted above make clear that Congress intended that the Act apply in Samoa, and a related provision appearing at 21 U.S.C. 881a (making ineligible for certain Federal program benefits a person convicted of growing a controlled substance), specifically names Samoa as one of the areas to which that section applies. So an amendment to the Act, naming the High

Court of Samoa as one with jurisdiction under the Act, would be compatible with its other provisions.

Under at least two sections of the Controlled Substances Act, however, it seems probable that the Samoa High Court has jurisdiction now, without any clarifying legislation. At 21 U.S.C. 842(c)(1), jurisdiction with respect to the imposition of civil penalties is granted to

The district courts of the United States (or, where there is no such court in the case of any territory or possession of the United States, then the court in such territory or possession having the jurisdiction of a district court of the United States in cases arising under the Constitution and laws of the United States) . . .

The District Court of Hawaii held in 1982, in Meaamaile v. American Samoa (550 F. Supp. 1227) that the High Court of American Samoa is "competent to decide cases arising under the Constitution and laws of the United States" (at p. 1236). The High Court may, therefore, be included within the language appearing at 21 U.S.C. 842(c)(1). Additionally, injunction jurisdiction under the Controlled Substances Act is given, at 21 U.S.C. 882(a), to the "district courts of the United States and all courts exercising general jurisdiction in the territories and possessions of the United States . . .", and the High Court of American Samoa is a court of general jurisdiction.

Finally, it should be noted that the Act authorizes various forms of cooperation between the U.S. and the "States," including financial grants (21 U.S.C. 872, 873), and that the U.S. Attorney General may contract with State and territorial law enforcement agencies for cooperative enforcement and regulatory activities (21 U.S.C. 873(a)(7)). The territories (including Samoa) are all comprehended by these provisions.

Conclusion: The Comprehensive Drug Abuse and Control Act should be amended to make clear that the High Court of American Samoa has the jurisdiction of a district court of the United States for purposes of enforcement of the Act.

Federal agency comment: Comments were requested from the Department of Justice. All comments received have been reflected above.

Subject: Egg Products Inspection
Title 21, Chapter 15 (21 U.S.C. 1031-1056)

Purpose: To protect consumers from eggs and egg products that are unwholesome, adulterated, or improperly labeled or packaged.

Territorial application: The Egg Products Inspection Act applies to the Virgin Islands (and Puerto Rico), but not to Guam, American Samoa, or the Northern Marianas.

Recommendation: Although the Pacific territories are not covered by the Egg Products Inspection Act, it is probable that there is no significant need in those areas for the protections that it affords. If there were, or if a need were to develop, the Act could effectively be extended to them by administrative action of the Secretary of Agriculture, acting pursuant to 48 U.S.C. 1469d(c).

Discussion: The Act is intended to protect consumers of eggs and egg products by providing a program of plant inspection by the Secretary of Agriculture. The regulatory scheme is complete, covering eggs and egg products in "commerce," a term defined to include interstate, foreign, and intrastate commerce (21 U.S.C. 1033(c)). Eggs and egg products "imported into the United States" are also subject to regulation (21 U.S.C. 1046).

Because the Egg Production Act was enacted rather recently, in 1970, it is somewhat surprising that it applies only to the Virgin Islands among the territories, but that is the necessary result of its language and its legislative history. The Act defines the term "State" to include among the offshore areas only the Virgin Islands and Puerto Rico (21 U.S.C. 1033(y)), and the term "United States" to mean the "States," so defined (21 U.S.C. 1033(z)). The readily available legislative history (1970 U.S. Code Cong. and Admin. News 5242) mentions the Virgin Islands on several occasions as among the noncontiguous areas affected (at pp. 5248, 5252, and 5254), but it neither mentions the Pacific territories nor explains their exclusion from the law. (The Virgin Islands is

mentioned in connection with the special labeling that is permitted for eggs or egg products brought to a "noncontiguous area of the United States," to show the place of production or origin. Only the Virgin Islands, Puerto Rico, Alaska, and Hawaii are permitted to impose labelling requirements to show that information (21 U.S.C. 1052(b)(2)). It is possible that the Pacific areas were excluded because of the absence in 1970, as now, of Agriculture inspection personnel in those areas. But it is also possible that they were excluded because of a lack of need, in light of the waiver authorized by the Act of eggs sold by an egg producer "with an annual egg production from a flock of three thousand or less [sic., should be 'fewer'] hens" (21 U.S.C. 1044(a)(7)). There are few, if any, chicken farmers in the territories with so substantial a flock.

If the magnitude of egg production in any of the Pacific territories were to warrant it, there is authority in the Secretary of Agriculture under a 1980 law (48 U.S.C. 1469d(c)) to extend the egg inspection program to them. That law permits the Secretary to extend "in his discretion, programs administered by the Department of Agriculture" to Guam, American Samoa, and the Northern Marianas. In the circumstances, there appears to be no need for Congressional action to make the Act applicable to any of those areas at this time.

Conclusion: Although the Egg Products Inspection Act does not apply to the Pacific territories, the program could be extended to them by administrative action, were a need to arise.

Federal agency comment: Comments were requested from the Departments of Agriculture and Justice. All comments received have been reflected above.

Subject: (a) Drug Abuse Prevention, Treatment, and Rehabilitation
Title 21, Chapter 16 (21 U.S.C. 1101-1181)

(b) National Drug Enforcement Policy
Title 21, Chapter 17 (21 U.S.C. 1201-1204)

(c) President's Media Commission on Alcohol and Drug
Abuse Prevention
Title 21, Chapter 18 (21 U.S.C. 1301-1308)

Comment: The laws considered herein present no statutory problems of likely concern to the territories at this time, but one section of the Drug Abuse Prevention, Treatment, and Rehabilitation Act (discussed at (a) below), currently dormant, should be clarified in the event that it is later funded to permit grants to territorial grantees.

Discussion: (a) The Drug Abuse Prevention, Treatment, and Rehabilitation Act (21 U.S.C. 1101-1181), enacted in 1972, contains only one section of likely interest to the territories--21 U.S.C. 1177, pertaining to project grants and contracts with "individuals and public and private nonprofit entities" on matters relating to the title of the Act. Much of the rest of the Act has been repealed, or its provisions transferred elsewhere in the Code; and most of what remains concerns Federal housekeeping, on such matters as coordination of Federal drug abuse efforts. The grant authority appearing at 21 U.S.C. 1177 is itself of academic interest only at this time, the authorization for appropriations having expired some years ago (21 U.S.C. 1177(b)). But because appropriations could be revived, it should be noted that while there are no geographic limitations with respect to the project grants and contracts provided for, also there are no express provisions making clear that persons and agencies in the territories are eligible. And the references to a "State" elsewhere in the section (21 U.S.C. 1171(c), (g)) suggest that they may not be eligible. A reference in one subsection to "Native American Pacific Islanders" (21 U.S.C. 1177(d)) in context probably means such Islanders resident in a State. It should be noted that a formula grant authority, now repealed, carefully defined "State" for purposes of those grants to include all of the current territories (formerly 21 U.S.C. 1176(a)). In the circumstances, were the project grants under 21 U.S.C. 1177 to

be revived, it should be made clear that persons and agencies in the territories are eligible.

(b) The chapter entitled National Drug Enforcement Policy (21 U.S.C. 1201-1204) contains the National Narcotics Act of 1984. The Act creates the National Drug Enforcement Policy Board, which is charged with facilitating coordination of Federal operations and policy on illegal drug law enforcement, both nationally and internationally (21 U.S.C. 1201(a)(2), (b)(1)). There are no other geographic provisions, so the Act has the same impact on the territories as on the States of the United States.

(c) The President's Media Commission on Alcohol and Drug Abuse Prevention (21 U.S.C. 1301-1308), created in 1986, is given responsibility to encourage and evaluate public educational efforts to prevent alcohol and drug abuse. Its charter runs "throughout the country" (21 U.S.C. 1302(3)), not otherwise defined, and it is reasonable to suppose that public education programs on this subject in the territories would be within its jurisdiction.

Conclusion: The laws considered herein require no change to accommodate the territories--unless funds are again provided for the grants authorized at 21 U.S.C. 1177 of the Drug Abuse Prevention, Treatment, and Rehabilitation Act. In that event, the eligibility of territorial grantees should be made clear.

Federal agency comments: Comments were requested from the Department of Health and Human Services and the Department of Justice. All comments received have been reflected above.

Title 22 - FOREIGN RELATIONS AND INTERCOURSE

- Contains nothing of substantial interest to the territories or the Trust Territory.
- * Contains matters of particular interest to the territories and the Trust Territory, but no legislative recommendations.

<u>Memorandum Number</u>	<u>Subject</u>	<u>22 U.S.C. sections</u>
22-1	* (a) Passports	211a-218
	- (b) Foreign Diplomatic and Consular Officers	254a-258a
	* (c) International Bureaus, Congresses, Etc.	261-290j-1
	- (d) Foreign Service Buildings	291-302
	- (e) Foreign Wars, War Materials, and Neutrality	401-465
	- (f) Hemispherical Relations	501-527
	- (g) Foreign Agents and Propaganda	611-621
	- (h) Service Courts of Friendly Foreign Forces	701-706
	- (i) The Republic of the Philippines	1354-1395
	- (j) United States Information and Exchange Programs	1431-1479
	- (k) Settlement of International Claims	1621-1645o
	- (l) Settlement of Investment Disputes	1650-1650a
	- (m) Protection of Citizens Abroad	1731-1732
	- (n) Mutual Security Program	1754-1945
	- (o) Middle East Peace and Stability	1961-1965

	Title 22 Contents
* (p) Protection of Vessels on the High Seas and in Territorial Waters of Foreign Countries	1971-1980
- (q) International Atomic Energy Agency Participation	2021-2026
- (r) Cultural and Technical Interchange Centers	2054-2057
- (s) Inter-American Cultural and Trade Centers	2081-2085
- (t) International Cooperation in Health and Medical Research	2101-2104
- (u) International Travel	2121-2127
- (v) Foreign Assistance	2151-2429a-1
- (w) Mutual Educational and Cultural Exchange Program	2451-2460
- (x) The Peace Corps	2501-2523
- (y) Arms Control and Disarmament	2551-2591
- (z) Migration and Refugee Assistance	2601-2605
- (aa) Foreign Gifts and Decorations	2621-2625
- (bb) Department of State	2651-2708
- (cc) Arms Export Control	2751-2796c
- (dd) International Expositions	2801-2807
- (ee) International Broadcasting	2871-2882
- (ff) Japan-United States Friendship	2901-2906
- (gg) Commission on Security and Cooperation in Europe	3001-3008

Title 22
Contents

- (hh) International Investment and Trade in Services Survey	3101-3108
- (ii) Nuclear Non-Proliferation	3201-3282
- (jj) Taiwan Relations	3301-3316
- (kk) Support of Peace Treaty Between Egypt and Israel	3401-3427
- (<u>ll</u>) Institute for Scientific and Technological Cooperation	3501-3513
- (mm) Panama Canal	3601-3871
* (nn) Foreign Service	3901-4226
- (oo) Authorities Relating to the Regulation of Foreign Missions	4301-4313
- (pp) Private Organization Assistance	4401-4413
- (qq) Soviet-Eastern European Research and Training	4501-4509
- (rr) United States Institute of Peace	4601-4611

Memorandum No. 22-1
October 1985

Subject: Title 22 of the United States Code
Foreign Relations and Intercourse

- (a) Passports
Title 22, Chapter 4 (22 U.S.C. 211a-218)
- (b) Foreign Diplomatic and Consular Officers
Title 22, Chapter 6 (22 U.S.C. 254a-258a)
- (c) International Bureaus, Congresses, Etc.
Title 22, Chapter 7 (22 U.S.C. 261-290j-1)
- (d) Foreign Service Buildings
Title 22, Chapter 8 (22 U.S.C. 291-302)
- (e) Foreign Wars, War Materials, and Neutrality
Title 22, Chapter 9 (22 U.S.C. 401-465)
- (f) Hemispherical Relations
Title 22, Chapter 10 (22 U.S.C. 501-527)
- (g) Foreign Agents and Propaganda
Title 22, Chapter 11 (22 U.S.C. 611-621)
- (h) Service Courts of Friendly Foreign Forces
Title 22, Chapter 13 (22 U.S.C. 701-706)
- (i) The Republic of the Philippines
Title 22, Chapter 15 (22 U.S.C. 1354-1395)
- (j) United States Information and Educational
Exchange Programs
Title 22, Chapter 18 (22 U.S.C. 1431-1479)
- (k) Settlement of International Claims
Title 22, Chapter 21 (22 U.S.C. 1621-1645o)
- (l) Settlement of Investment Disputes
Title 22, Chapter 21A (22 U.S.C. 1650-1650a)
- (m) Protection of Citizens Abroad
Title 22, Chapter 23 (22 U.S.C. 1731-1732)
- (n) Mutual Security Program
Title 22, Chapter 24 (22 U.S.C. 1754-1945)

- (o) Middle East Peace and Stability
Title 22, Chapter 24A (22 U.S.C. 1961-1965)
- (p) Protection of Vessels on the High Seas and in
Territorial Waters of Foreign Countries
Title 22, Chapter 25 (22 U.S.C. 1971-1980)
- (q) International Atomic Energy Agency Participation
Title 22, Chapter 28 (22 U.S.C. 2021-2026)
- (r) Cultural and Technical Interchange Centers
Title 22, Chapter 29 (22 U.S.C. 2054-2057)
- (s) Inter-American Cultural and Trade Center
Title 22, Chapter 29A (22 U.S.C. 2081-2085)
- (t) International Cooperation in Health and Medical
Research
Title 22, Chapter 30 (22 U.S.C. 2101-2104)
- (u) International Travel
Title 22, Chapter 31 (22 U.S.C. 2121-2127)
- (v) Foreign Assistance
Title 22, Chapter 32 (22 U.S.C. 2151-2429a-1)
- (w) Mutual Educational and Cultural Exchange Program
Title 22, Chapter 33 (22 U.S.C. 2451-2460)
- (x) The Peace Corps
Title 22, Chapter 34 (22 U.S.C. 2501-2523)
- (y) Arms Control and Disarmament
Title 22, Chapter 35 (22 U.S.C. 2551-2591)
- (z) Migration and Refugee Assistance
Title 22, Chapter 36 (22 U.S.C. 2601-2605)
- (aa) Foreign Gifts and Decorations
Title 22, Chapter 37 (22 U.S.C. 2621-2625)
- (bb) Department of State
Title 22, Chapter 38 (22 U.S.C. 2651-2708)

- (cc) Arms Export Control
Title 22, Chapter 39 (22 U.S.C. 2751-2796c)
- (dd) International Expositions
Title 22, Chapter 40 (22 U.S.C. 2801-2807)
- (ee) International Broadcasting
Title 22, Chapter 43 (22 U.S.C. 2871-2882)
- (ff) Japan-United States Friendship
Title 22, Chapter 44 (22 U.S.C. 2901-2906)
- (gg) Commission on Security and Cooperation in Europe
Title 22, Chapter 45 (22 U.S.C. 3001-3008)
- (hh) International Investment and Trade in Services
Survey
Title 22, Chapter 46 (22 U.S.C. 3101-3108)
- (ii) Nuclear Non-Proliferation
Title 22, Chapter 47 (22 U.S.C. 3201-3282)
- (jj) Taiwan Relations
Title 22, Chapter 48 (22 U.S.C. 3301-3316)
- (kk) Support of Peace Treaty Between Egypt and Israel
Title 22, Chapter 49 (22 U.S.C. 3401-3427)
- (ll) Institute for Scientific and Technological
Cooperation
Title 22, Chapter 50 (22 U.S.C. 3501-3513)
- (mm) Panama Canal
Title 22, Chapter 51 (22 U.S.C. 3601-3871)
- (nn) Foreign Service
Title 22, Chapter 52 (22 U.S.C. 3901-4226)
- (oo) Authorities Relating to the Regulation
of Foreign Missions
Title 22, Chapter 53 (22 U.S.C. 4301-4313)
- (pp) Private Organization Assistance
Title 22, Chapter 54 (22 U.S.C. 4401-4413)

(qq) Soviet-Eastern European Research and Training
Title 22, Chapter 55 (22 U.S.C. 4501-4509)

(rr) United States Institute of Peace
Title 22, Chapter 56 (22 U.S.C. 4601-4611)

Comment: The Federal laws contained in Title 22 contain little of interest to the territories or the Trust Territory, and require no modification to meet their current needs.

Discussion: (a) The chapter concerning Passports (22 U.S.C. 211a-218) details procedures for the issuance of U.S. passports, including who may receive them and who may issue them. Passports may be granted only to "those owing allegiance, whether citizens or not, to the United States" (22 U.S.C. 212); they may be issued by, among others, "the chief or other executive officer of the insular possessions of the United States", if designated by the President to do so (22 U.S.C. 211a). Territorial governors have routinely been empowered to issued passports--and in the case of the Virgin Islands and Guam, revenues arising from this activity are covered into the territorial treasuries (48 U.S.C. 1642, 1421h, respectively).

Given the language quoted above from 22 U.S.C. 212, it is clear that citizen residents of the Virgin Islands and Guam may obtain U.S. passports, and they do so; equally, American Samoans, whether they be U.S. citizens or nationals, may do so. (A "national" of the United States is defined to include a person who, although not a U.S. citizen, owes permanent allegiance to the United States (8 U.S.C. 1101(a)(22)).

The people of the Trust Territory--excluding citizens of the Northern Marianas for purposes of this discussion--do not receive U.S. passports (being aliens under U.S. law), but they are entitled to receive a Travel Document that is issued by the High Commissioner of the Trust Territory and that entitles the bearer to U.S. diplomatic and consular protection while traveling abroad. The Trusteeship Agreement, in Article 11(2), requires that the United States afford this protection to the people of the Trust Territory, and early in the U.S. administration of the area, the Departments of State and

Interior cooperated in devising a document and a procedure for its issuance that carries out this requirement of the Trusteeship Agreement. So far as is known, there have been no difficulties that have arisen concerning the issuance or use of the Trust Territory Travel Document--which is the equivalent of a passport. Under section 126 of the Compact of Free Association, the U.S. is required to extend the same consular assistance to citizens of the Freely Associated States as it extends to U.S. citizens, if the particular Freely Associated State requests that service.

The situation differs in the Northern Marianas. In January 1978 the Government of the Northern Marianas came into existence, as an entity separate from the Government of the Trust Territory. Since then, as before that, citizens of the Northern Marianas can continue to obtain Trust Territory Travel Documents from the High Commissioner, who is generally without other authority in the Northern Marianas at this time; or they may obtain Certificates of Identity, issued under the laws of the Northern Marianas. These Certificates are intended not only to evidence U.S. consular protection of the bearer while traveling abroad, but to permit easy entry into the United States, because since January 1978 citizens of the Northern Marianas (as defined in the Covenant, and in the Northern Marianas Constitution, and in the Certificates of Identity Act, all in the same way) are entitled to enter the United States for residence or work as freely as U.S. citizens. They will be collectively naturalized upon termination of the Trusteeship Agreement.^{1/}

Although the U.S. Immigration Service has officially instructed its field offices to accord U.S. citizen-type treatment to those carrying the Northern Marianas Certificate

^{1/} All of the foregoing is explained more fully in Smith v. Pangilinan, 651 F.2d 1320 (1981), a case involving the issuance of Certificates of Identity to some 120 Filipinos, allegedly domiciled in the Northern Marianas. The issue in the reported case was the District's Courts's denial of a petition to intervene filed by the U.S. Attorney General. The Court of Appeals for the Ninth Circuit reversed the denial order of the District Court for the Northern Marianas.

of Identity, the system has not always worked. The instructions have not been given the status of regulations, and they are sometimes overlooked. Those with Certificates of Identity, therefore, sometimes encounter delays and arguments when they seek to enter the U.S. To meet this problem, the Northern Marianas Federal Laws Commission recommended enactment of legislation--which would expire upon trusteeship termination--to require the Secretary of State to issue a special passport to Northern Marianas citizens (Second Interim Report, pp. 209-213). Inasmuch as Trusteeship termination is likely soon to occur, and inasmuch as Federal legislation--even if simple and noncontroversial--takes both time and energy to accomplish, the recommendation does not have practicality on its side. For that reason, it is not repeated here. Should the problem persist and be of unanticipated duration, it ought to be attacked administratively, either by fortified internal instructions to Immigration officers or by formal regulations.

(b) The chapter entitled Foreign Diplomatic and Consular Officers (22 U.S.C. 254a-258a) in part concerns the treatment to be accorded foreign diplomatic representatives and members of their families. These provisions are without geographical limitations, and are thus apparently applicable throughout the territories--and probably to the Trust Territory so long as it remains as such, although the issue is unlikely to arise there because there have not been and are not likely to be during the trusteeship period any foreign diplomats stationed on Trust Territory soil.

Remaining provisions of the chapter concern foreign seamen and the responsibilities and jurisdiction, under applicable treaties and conventions, of consuls or other diplomatic representatives of foreign governments and of U.S. courts. In general, internal order aboard a foreign vessel is the responsibility of the consul; breaches of the peace or other trouble ashore are within the jurisdiction of the local courts, but the consular authority may call upon the courts for aid (22 U.S.C. 257, 258).

These laws contain two possible shortcomings for purposes of this study: (1) U.S. citizen seamen are not subject to the

special treatment provided for, but are instead "left to the ordinary course of law" (22 U.S.C. 258), and (2) the court jurisdiction granted is confined to the courts of the United States, thereby excluding Samoa. The first of these shortcomings was thought by the Northern Marianas Federal Laws Commission to be of sufficient magnitude to warrant legislative correction (so as to accord to seamen from the Northern Marianas the status of U.S. citizens--see Interim Report, January 1982, p. 32). It has been corrected by Presidential Proclamation 5207 of June 7, 1984 (section 5(d)). The second shortcoming remains, and is likely to remain until a Federal court is granted jurisdiction in Samoa. The matter does not appear sufficiently troublesome in Samoa to warrant modification of the laws found at 22 U.S.C. 256-258a, most of which derive from a law enacted in 1864. Although alien seamen have created problems in Samoa from time to time, in light of raucous or worse on-shore conduct, those problems have been met notwithstanding the absence there of the Federal judiciary or of other special court machinery. Corrective legislation should be sought only if there is a clear problem that its enactment will resolve, and there is no such problem in Samoa at this time.

(c) International Bureaus, Congresses, Etc. (22 U.S.C. 261-290j-1) deals with an enormous number of international organizations of which the United States is a member, ranging from those of the greatest significance (the United Nations, the World Bank), to the least,^{2/} and including several in between that hold special interest to the territories and the Trust Territory: the South Pacific Commission (22 U.S.C. 280-280c), the sometime Caribbean Commission (still at 22 U.S.C. 280h-280i, although it ceased to exist about two decades ago), and the Asian Development Bank (22 U.S.C. 285-285y).

^{2/} It would be unwise to attempt to judge which international organization of which the U.S. is a member is the one of "least significance", but almost certainly the one that costs the U.S. the least is the Central Bureau of the International Map of the World on the Millionth Scale, for which the Congress has authorized "an annual sum of \$50" as the U.S. contribution (22 U.S.C. 269a). To judge from the extensive codifier's notes, this sum had been contributed from fiscal year 1930 to the present.

These many laws, pertaining as they do to particular international organizations, and designed to implement U.S. participation in them, do not usually have geographic application to particular areas as such. The more recent ones, however, recognize the territories of the United States in various particulars. The laws pertaining to the Asian Development Bank, for example, provide for the removal to the appropriate Federal District Court of civil actions brought "within the United States, its territories or possessions . . ." (22 U.S.C. 285f); for the "full force and effect" of the agreement giving rise to the Bank "in the United States, its territories and possessions..." (22 U.S.C. 285g); and for a U.S. vote against a loan "for the benefit of any country" which has expropriated the property of a U.S. citizen^{3/} or corporation (22 U.S.C. 285o).

From time to time in the past, territorial representatives have approached international lending institutions, such as the World Bank, to obtain financial assistance from them. The Asian Development Bank in particular has been viewed by the Pacific territories as a source of funds to augment those available to them from local sources and from the U.S. Treasury. The U.S. territories have been consistently turned down as possible borrowers, for either or both of two reasons: the international lending agency exists in order to aid underdeveloped countries, and a political subdivision (i.e., territory) of a developed country (i.e., the U.S.) is not regarded as eligible--and often the charter of the international organization so provides; or the U.S., as a

^{3/} The expropriation provision cited, and others similar to it in this chapter of Title 22, refer to "citizens" of the United States; and other provisions of the chapter require citizenship status as a prerequisite for appointment to positions in or advisory groups to various of the international organization. The Northern Marianas Commission on Federal Laws did not consider these provision to be sufficiently troublesome to include them in its 1982 Interim Report, which was intended to list citizenship provisions that ought to be waived as to citizens of the Northern Marianas for the period preceding trusteeship termination. That conclusion is reasonable and is adopted here. The same conclusion seems appropriate with respect to noncitizen Samoans.

matter of fundamental policy, regards itself as responsible for its own territories and thus opposes a U.S. territory's obtaining financial assistance from an international organization of which the U.S. is a member.

These bases for the territories' ineligibility are not matters that could be overcome by statute, at least not without monumental difficulties. There are provisions in existing law that would seem to fortify the territories' ineligibility, but the modification of such provisions would be insufficient alone to permit the territories to become international borrowers--even if that modification could, as a practical matter, be achieved, and it probably could not. For example, a 1970 law requires annual reports to the Congress on new loans made by, among others, the World Bank and Asian Development Bank, with "a discussion of how each loan will benefit the people of the recipient country" (22 U.S.C. 286b-1). A territory is not a "country", but even if that word were struck, the policies of the Bank and long-standing policies of the United States would continue to preclude loans to U.S. territories.

In sum, no useful purpose would be served for the territories by the modification of the laws set forth in Chapter 7 of Title 22.

With the effectiveness of the Compact of Free Association, under its current terms the Freely Associated States may, with U.S. cooperation, become members in their own right of regional and international organizations (sec. 122). As such, they will gain an eligibility to participate in programs of those organizations that is not available to the U.S. territories.

(d) The provisions here codified concerning Foreign Service Buildings (22 U.S.C. 291-302) grant authority to the Secretary of State for the lease or acquisition "in foreign countries" (e.g., 22 U.S.C. 292) of facilities for U.S. diplomatic and consular establishments and living quarters for U.S. personnel. The provisions have no application to the territories, which are not foreign, although they could apply

to the Micronesian Freely Associated States, if the Compact now awaiting approval ultimately takes its present form.

Somewhat buried within the chapter is a 1978 law authorizing the Secretary of State to demonstrate renewable energy systems "in foreign countries" (22 U.S.C. 292a). This authority would properly not extend to the territories (which are, in any event, the subject of more comprehensive renewable energy legislation at 48 U.S.C. 1492-1493), but could apply to post-Trusteeship Micronesia.

(e) Under Foreign Wars, War Materials, and Neutrality (22 U.S.C. 401-465) there appear three laws from earlier in the 20th century, all of which apply to the territories, and at least in part, to the Trust Territory as well. (i) The Seizure of Arms Intended for Export Act of 1917 authorizes the President's designee to seize arms or munitions of war, and the ships or other vehicles that carry them, when the arms are to be exported from the United States (22 U.S.C. 401), with the "United States" defined to include all territory subject to U.S. jurisdiction (22 U.S.C. 408a), a definition that comprehends all of the territories and the Trust Territory. (ii) The Neutrality Act of 1939 provides that, when a proclamation declares that a war exists between foreign states, then citizens of the U.S. cannot travel on the vessels of such states (22 U.S.C. 445); financial transactions concerning their bonds and other securities are restricted as to persons "within the United States" (22 U.S.C. 447); and vessels carrying men, ammunition, and information, among other things, from a place within "the jurisdiction of the United States" to a belligerent, are subject to restrictions (22 U.S.C. 450). The "United States" includes the Territories and possessions (22 U.S.C. 456(a)), but internal references suggest that some provisions apply to the Trust Territory as well, because it is within U.S. jurisdiction. (iii) A 1909 law authorizes the President to use force to compel the departure of a foreign vessel from "the United States or any of its possessions," or to force its detention there, if that would be proper in light of "the law of nations or the treaties of the United States" (22 U.S.C. 462). The inclusion of the territories seems clear. But the 1909 law elsewhere vests enforcement in Federal district courts (22 U.S.C. 461), which creates a difficulty in Samoa, which has none; but it

also makes reference to "the capture of a vessel within the jurisdiction or protection of the United States" (22 U.S.C. 461), a phrase that comprehends all of the territories and the Trust Territory. The result is uncertainty as to the Trust Territory, but the uncertainty does not require attention in light of the Trust Territory's impending new political status.

(f) Hemispherical Relations (22 U.S.C. 501-527) concerns governmental relations between the United States and the "American republics" of Central and South America. It contains nothing material for the purposes of this study.

(g) The chapter entitled Foreign Agents and Propaganda (22 U.S.C. 611-621) contains the Foreign Agents Registration Act, initially enacted in 1938 but often amended since. The Act requires every person who acts "as an agent of a foreign principal" to file a detailed statement with the U.S. Attorney General (22 U.S.C. 612). A "foreign principal" can be a foreign government or a "person outside the United States", unless the latter is a citizen of and domiciled in the United States (22 U.S.C. 611(b)(2)). There are several exemptions, running to diplomats, other foreign government officials, lawyers appearing before courts in the United States, and others (22 U.S.C. sec. 613), with those who are regarded as foreign agents being principally persons who engage in political activities, public relations (i.e., lobbying), and fund-raising (22 U.S.C. 611(c)).

The Act applies fully to the territories and the Trust Territory, having been amended in 1942 to state expressly that it applies to "the Territories . . . the insular possessions, and all other places now or hereafter subject to the civil or military jurisdiction of the United States" (22 U.S.C. 619). Hence, an agent of a foreign government who seeks to influence the proceedings of a legislative body in the Trust Territory is, as of this time, required to register. That circumstance will cease with the effectiveness of the Compact, assuming its approval in its present form, but thereafter representatives of the Freely Associated States who are U.S. citizens would, following consultation with the U.S., not be required to register in the U.S., in light of section 153(a) of the Compact.

As noted above, a foreign principal is defined as one outside the United States, if he is not a citizen and domiciliary of the United States (22 U.S.C. 611(b)). Presidential Proclamation 5207 of June 7, 1984, in section 5(e), waives that citizenship requirement as to citizens of the Northern Marianas for the period preceding trusteeship termination, thereby accommodating the unlikely case of a Northern Marianas citizen situated in a non-U.S. area who hires an agent to represent him in the United States.

(h) Service Courts of Friendly Foreign Forces (22 U.S.C. 701-706) sets out a procedure by which a military service of a "friendly foreign state" may, when the President so declares, obtain the arrest in the U.S. and arrange for trial of a member of that foreign military service. The procedure is not now in force, but could become so by Presidential action (22 U.S.C. 706). It applies throughout the Territories, the possessions, "and any other place subject to the jurisdiction of the United States" (22 U.S.C. 701(c)). It thus applies to all of the areas that are the subject of this study, and that is appropriate.

(i) The laws remaining on the subject of The Republic of the Philippines (22 U.S.C. 1354-1395) concern Philippine independence in 1946, and such related matters as trade relations between the Governments of the Philippines and the United States, and U.S. acquisition of military sites in the Philippines. The provisions contain nothing of interest in this study, notwithstanding the limited definition of "United States" (22 U.S.C. 1360(a)(2)) for purposes of some sections. A broader definition appears (22 U.S.C. 1395) for purposes of other sections.

(j) Chapter 18, United States Information and Educational Exchange Programs (22 U.S.C. 1431-1479) creates the United States Information Agency and empowers it to engage in programs for information, cultural, and educational exchange. Implicitly, and to some extent explicitly (22 U.S.C. 1461), its authority does not extend to the territories and possessions. The agency has not carried on its activities in the Trust Territory, but there would appear to be no bar to

its doing so in post-trusteeship Micronesia. A citizenship requirement for assignment by USIA of U.S. Government employees abroad was eliminated in 1982 (22 U.S.C. 1451-1453), thereby rendering moot a recommendation of the Northern Marianas Federal Laws Commission that the provision be waived as to Northern Marianas citizens for the period preceding trusteeship termination (1982 Interim Report, pp. 14-15).

(k) The chapter entitled Settlement of International Claims (22 U.S.C. 1621-1645o) contains the International Claims Settlement Act of 1949 and provides now for the Foreign Claims Settlement Commission to be a part of the Department of Justice. The law provides for the filing of claims by U.S. nationals, defined throughout as including noncitizen nationals as well as citizens, against particular foreign governments for their loss of property as a result of nationalization, expropriation, or other taking. The chapter is largely executed, but it has, in any event, application to the people of the Virgin Islands, Guam, and Samoa as claimants. A few definitions are not sufficient to comprehend corporations organized under their territorial laws (e.g., 22 U.S.C. 1641(2), 1645a), but this has presented no known problem and thus does not seem to require correction at this late date. Of greater concern in some of the offshore areas are procedures for the settlement of claims against the United States for World War II activities. That subject is not dealt with in Title 22. Micronesian claims, including those from the Northern Marianas, were the subject of the Micronesian Claims Act of 1971 (Pub. L. 92-39), and those associated with Federal land takings in Guam, most recently in the Territories Omnibus Act of 1977 (48 U.S.C. 1424c).

(l) The Settlement of Investment Disputes (22 U.S.C. 1650-1650a) implements the International Convention on the Settlement of Investment Disputes, and vests in the District Courts, including those for the Virgin Islands, Guam, and the Northern Marianas, jurisdiction of arbitration awards under the Convention (22 U.S.C. 1650a(b)). Samoa is, typically, not included, but in the absence of a practical problem arising from that fact, it is unnecessary to treat the matter legislatively.

(m) In the chapter headed Protection of Citizens Abroad (22 U.S.C. 1731-1732) there appear two laws, enacted in 1868, which (i) give to naturalized citizens the same entitlement as native-born citizens to protection while traveling abroad (22 U.S.C. 1731), and (ii) require the President to act to achieve the release of U.S. citizens who are improperly imprisoned by a foreign government (22 U.S.C. 1732). The Northern Marianas Commission on Federal Laws recommended that the second of these be expanded to include citizens of the Northern Marianas for the period preceding trusteeship termination, but the implementing Presidential Proclamation (No. 5207) did not do so. Since current events suggest that the statute is insufficient for the purpose intended, it does not seem that a useful purpose would be served by extending its provisions to the non-U.S. citizens of either the Northern Marianas or Samoa.

(n) The Mutual Security Program (22 U.S.C. 1754-1945) contains the Mutual Security Act of 1954 and related laws, which provide military, economic, and other aid to foreign countries. These laws are not relevant to this study.

(o) The chapter entitled Middle East Peace and Stability (22 U.S.C. 1961-1965) concerns assistance to nations "in the general area of the Middle East," and is also irrelevant to this study.

(p) Protection of Vessels on the High Seas and in Territorial Waters of Foreign Countries (22 U.S.C. 1971-1980) concerns two subjects: the Fishermen's Protective Act of 1967, which affords protection to commercial fishermen whose vessels are seized by foreign governments; and restrictions on the import of endangered or threatened species. The first of these applies to the territories (but not the Trust Territory); the second to the Virgin Islands only.

The Fishermen's Protective Act requires the Secretary of State to act if a "vessel of the United States" is seized by a foreign government on the basis of that government's claim to waters not recognized by the United States, or by a foreign government that otherwise violates specified standards of

behavior (22 U.S.C. 1972). The Secretary of State is to act to protect the crew and obtain the release of the vessel, and may reimburse the owner of the vessel for charges related to the seizure and release of the vessel (22 U.S.C. 1973). Because the vessel documentation laws have lately been amended so as to permit non-U.S. citizens in both Samoa and the Northern Marianas to obtain documentation of vessels, and thus status as "vessels of the United States" (sec. 301, Pub. L. 98-454 (1984), 46 U.S.C. 2101 (3a)), vessel owners in all of the territories that are the subjects of this study can now obtain the protection afforded by this law. Those of the Trust Territory cannot, but given the Trust Territory's probable early change in political status, this result is appropriate. Procedures for the placing of a lien on the released vessel for the amount of the reimbursement are dependent upon a Federal district court (22 U.S.C. 1973(b)), and are thus not available in Samoa where there is none, but that condition is not under this law hurtful to Samoa, so there is no need on its behalf to modify the provision.

Restrictions contained in this chapter upon the importation of endangered or threatened species do not apply to the Pacific areas--Samoa, Guam, the Northern Marianas, or the Trust Territory. The law permits the President to prohibit the importation "into the United States" of fish or wildlife products from foreign countries that violate international fishery conservation programs or endangered or threatened species programs, but for this purpose "the United States" is defined to include only the States, Puerto Rico, and the Virgin Islands (22 U.S.C. 1978(h)(2)). This is appropriate, because the law is enforced through the Bureau of Customs, which has no agents in the Pacific territories. In any event, the Pacific areas experience no direct loss as a result of their exclusion.

(q) Participation by the United States in the International Atomic Energy Agency is authorized by this chapter (22 U.S.C. 2021-2026). It contains no provisions relevant to this study.

(r) Notwithstanding its broad title, Cultural and Technical Interchange Centers (22 U.S.C. 2054-2057), the

chapter deals solely with the East-West Center in Honolulu, the full title of which is the Center for Cultural and Technical Interchange Between East and West. Because it is intended to draw together "scholars and students . . . from the nations of the East and West" (22 U.S.C. 2054) it contains no geographical constraints, and in fact its facilities have been made available to people from the territories and the Trust Territory.

(s) The Inter-American Cultural and Trade Center (22 U.S.C. 2081-2085) authorizes U.S. participation in a Center whose purpose is to provide a meeting ground "for the governments and industries of the Western Hemisphere and of other areas of the world" (22 U.S.C. 2081(1)). The words are sufficient to permit territorial participation.

(t) The chapter entitled International Cooperation in Health and Medical Research (22 U.S.C. 2101-2104) authorizes a program of cooperation with participating foreign countries in the health sciences through fellowships, financial grants, and technical assistance. The only limiting provision for purposes of this study appears at 22 U.S.C. 2103(e), where the President is authorized to appoint advisory committees composed of "citizens of the United States". Because of the relative absence now of medical experts of Samoan or Northern Marianas origin, the provision does not seem to require modification.

(u) International Travel (22 U.S.C. 2121-2127) contains the National Tourism Policy Act, which is designed to encourage "tourism and recreation in the United States" and which creates for that purpose the U.S. Travel and Tourism Administration in the Department of Commerce. Because of the importance of the tourist business, both actually and potentially, in the areas that are the subjects of this study, it is gratifying that the law defines the United States to include them all by name (22 U.S.C. 2127). (The Northern Marianas is included within the reference to the Trust Territory, because it was part of the Trust Territory when the definition was enacted in 1970). A program of Federal grants (22 U.S.C. 2123(a)(5)) has been discontinued. An advisory committee of "citizens of the United States" is established

(22 U.S.C. 2124b(a)(2)), but because of the additional and rather rigid qualifications required of all members (22 U.S.C. 2124b(a)(3)), it seems unlikely that there is a need to enable membership by either Samoans or Northern Mariana citizens. (The Northern Marianas Commission on Federal laws offered no recommendation on this point.)

(v) The extensive chapter on Foreign Assistance (22 U.S.C. 2151-2429a-1) concerns economic and military assistance to foreign countries, and is not directly relevant to the territories or the Trust Territory. It provides for the Agency for International Development and for aid to "developing countries" under the foreign assistance acts of the last several decades. The chapter provides as well for certain military assistance to "friendly countries" and to international organizations. Because the laws that appear here are directed to foreign countries, they have not been and are not now a source of aid to the territories or the Trust Territory.

References appear on several occasions to "citizens of the United States", and in two such cases the term has in effect been defined by Presidential proclamation to include citizens of the Northern Marianas in the interval preceding trusteeship termination (22 U.S.C. 2198, pertaining to eligibility for insurance from the Overseas Private Investment Corporation, and 22 U.S.C. 2396(e), pertaining to the training of AID personnel, secs. 4(1) and 2(d), respectively, Proclamation 5207). The remaining sections that use the term (22 U.S.C. 2151n-1, 2174, 2351(b)(4), 2370(a)(2), 2391(c), and 2394a) do not appear to require attention from the standpoint of Samoa or the Northern Marianas, being either exhortations or provisions of limited likely concern to either area.

(w) The Mutual Educational and Cultural Exchange Program (22 U.S.C. 2451-2460) provides for the exchange programs of the United States Information Agency, intended to "increase mutual understanding between the people of the United States and the people of other countries" (22 U.S.C. 2451). The people of the territories and of the Trust Territory (for now) are comprehended in the term "people of the United States". One provision which requires U.S.

nationality status for educational exchanges could constitute an impediment to Northern Marianas students at this time: 22 U.S.C. 2452(a)(1)(A) permits U.S. financial assistance for educational exchange students who are "American citizens and nationals in foreign countries". (Surprisingly, the Northern Marianas Federal Laws Commission did not recommend waiver of this requirement.) Many related provisions, however, contain no U.S. citizenship or nationality requirement (e.g., 22 U.S.C. 2452(a)(1)(ii)), so Northern Marianas students are not likely to be disadvantaged, even during the presumably brief interval before trusteeship termination.

(x) The laws concerning The Peace Corps (22 U.S.C. 2501-2523) are clear as to who can serve as Peace Corps volunteers, but less clear as to where they may serve. Peace Corps volunteers must be citizens or nationals of the U.S. (22 U.S.C. 2504(a), 2505), a term in effect expanded by Proclamation 5207, section 2(e), to include citizens of the Northern Marianas for the period preceding trusteeship termination. As to where they may serve, the key term is "abroad", defined at 22 U.S.C. 2522 to mean outside of the States and the District of Columbia; i.e., the purpose of the Peace Corps is declared to be to "make available to interested countries and areas men and women of the United States qualified for service abroad . . ." (22 U.S.C. 2501); and volunteers may be enrolled in the Peace Corps "for service abroad" (22 U.S.C. 2504).

As a result of a series of decisions, usually policy decisions masquerading as legal opinions, it was concluded in the 1960's that "abroad" included the Trust Territory, where Peace Corps Volunteers have served in abundant numbers, but did not include the territories. (The VISTA program is a kind of domestic equivalent, and is available to the territories. See, Memorandum No. 42-12(s).) Shortly after the creation of the Peace Corps in 1961, when the High Commissioner requested a peace corps program there, the Peace Corps concluded that it was without authority to send volunteers to the Trust Territory. In the mid-1960's it reversed that decision (with a result clearly compatible with the statute as quoted above), but it continued to take the position that it could not supply volunteers for programs in the territories. The Peace Corps no longer serves in the Northern Marianas, on the ground that

it is no longer needed there, although the agency believes it could continue to do so as a matter of law in the period preceding trusteeship termination.

The long-continued Peace Corps position as to its authority to serve in the Trust Territory but not in the U.S. territories is a reasonable one, and it would not benefit from either modification or fortification by further legislative action.

(y) The Chapter on Arms Control and Disarmament (22 U.S.C. 2551-2591) creates the United States Arms Control and Disarmament Agency, which is primarily responsible for U.S. participation in international negotiations on that subject. Nothing contained in the laws associated with it is directly relevant to this study.

(z) Laws concerning Migration and Refugee Assistance (22 U.S.C. 2601-2605) authorize U.S. participation in international programs to assist refugees, and also authorize Federal programs of assistance when the President makes determinations to initiate them--in order to meet "unexpected urgent refugee and migration needs" (22 U.S.C. 2601(c)(1)). It might be noted that an authorization of funds to "State and local public agencies" for their aid to particular refugees--apparently limited to the States alone--was eliminated in 1980. The matter is now the subject of another law (see Memorandum No. 8-1). The chapter contains no current provisions of interest to this study.

(aa) The laws remaining under Foreign Gifts and Decorations (22 U.S.C. 2621-2625) are for purposes of this study obsolete, relating only to gifts or decorations "on deposit with the Department of State on October 15, 1966" (22 U.S.C. 2625).

(bb) Laws collected under the title Department of State (22 U.S.C. 2651-2708) provide for the organization of the Department and certain of its functions. No provision here codified creates a problem for the territories or the Trust Territory, except for two that refer to U.S.

citizens: at 22 U.S.C. 2670(j), the Secretary of State is authorized to provide emergency assistance to United States citizens abroad who are incarcerated or destitute, and at 22 U.S.C. 2701 he may provide primary and secondary school facilities for the "children of United States citizens stationed outside the United States" where there is a need for them. By Presidential Proclamation 5207, citizens of the Northern Marianas are regarded for purposes of these sections as U.S. citizens for the period preceding trusteeship termination (secs. 3(b)^{4/} and 6(e)). As for noncitizen Samoans, none are known to serve the United States abroad at this time; and if any Samoan travelers abroad need the help provided for at 22 U.S.C. 2670(j), it seems probable that the Department of State would not refrain from acting on the ground that the individual is a national but not a citizen.

(cc) Arms Export Control (22 U.S.C. 2751-2796c) implements the U.S. policy of permitting sales of weapons, munitions, aircraft, and other articles of war to friendly countries and international organizations, if consistent with U.S. foreign policy interests and if conducted pursuant to the restrictions imposed in the law here codified. The term "United States" appears often in a geographical sense, notably at 22 U.S.C. 2778(a)(1), which authorizes the President

to control the import and export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services.

Every such "person" who engages in exporting or importing designated defense articles and defense services must

^{4/} The reference in section 3(b) of Proclamation 5207 is to 22 U.S.C. 2670(g), but this is probably an error, because subsection (g) makes no reference to "citizens", and because the primary document on which the Proclamation is based, i.e., the January 1982 Interim Report of the Northern Marianas Commission Federal Laws, refers to 22 U.S.C. 2670(j) (p. 20).

register, and may export or import only under the terms of the license granted.

The term "United States" is not defined (except that until 1979, it expressly included the Canal Zone), but the legislative history of the Arms Export Control Act indicates the Congress' purpose to control and restrain the international trade in arms as fully as "national interests" require, and that would seem to mean as fully as its authority permits (1976 U.S. Code Cong. and Admin. News 1378, 1388). That being so, the Act, and particularly 22 U.S.C. 2778, should be viewed as fully applicable to the territories and probably, for now, to the Trust Territory.

(dd) The 1970 law on International Expositions (22 U.S.C. 2801-2807) provides that an international exposition to be held "in the United States" may be accorded Federal Government recognition--and along with that, potentially a Federal pavilion--if the proposed exposition meets specified standards. While the "United States" is not defined in the statute, there is also no language in the law to suggest that the territories are not included, and Commerce Department regulations define an applicant "State" to include the Virgin Islands, Guam, Samoa, and the Trust Territory (15 CFR 310.2(f))--with the latter doubtless intended to comprehend the Northern Marianas. The areas that are the subject of this study could, thus, be eligible for Federal assistance, in the unlikely event that any is the proposed site of an international exposition.

(ee) The chapter entitled International Broadcasting (22 U.S.C. 2871-2882) concerns Radio Free Europe, and is irrelevant to this study. The requirement, thus, for U.S. citizenship for members of the Board of International Broadcasting (22 U.S.C. 2872(b)(2)) can safely be ignored.

(ff) The Japan-United States Friendship Act (22 U.S.C. 2901-2906) provides for an educational and cultural exchange program between the two nations, based in part on sums due the U.S. from Japan in connection with the reversion of Okinawa to Japan. The law, passed in 1975, often uses the term "United

States" in a geographical sense, as, for example, in connection with studies by Japanese students in institutions of higher education in "the United States" (22 U.S.C. 2902(b)(1)). The term is not defined, but it is also nowhere limited. The legislative history is silent on the point (1975 U.S. Code and Admin. News 1109.) It is therefore likely that the term comprehends the territories, so that, for example, a Japanese scholar might obtain financial support under the statute for study at the University of Guam, and a citizen-scholar of the Northern Marianas might be enabled to study in Japan.

(gg) The Commission on Security and Cooperation in Europe (22 U.S.C. 3001-3008), created to implement the Helsinki Declaration of August 1975, has no direct relevance for purpose of this study.

(hh) The International Investment and Trade in Services Survey Act (22 U.S.C. 3101-3108), initially enacted in 1976, grants "clear and unambiguous" authority to the President--delegated by him to the Director of the Office of Management and Budget--to collect data on these subjects. He is to do so with respect to persons and organizations in the "United States", and "United States", means "all territories and possessions of the United States" (22 U.S.C. 3102(1)). The authority granted thus extends to all of the territories, including the Northern Marianas (by operation of section 502(a)(2) of the Covenant), but not to the Trust Territory.

(ii) The Nuclear Non-Proliferation Act of 1978 (22 U.S.C. 3201-3282) is intended to diminish the proliferation of nuclear weapons by controlling the availability of nuclear fuel supplies to foreign nations, and by assisting developing nations to acquire nonnuclear energy systems. The Act speaks of the United States (undefined) on the one hand, and often of "other nations or groups of nations", on the other (e.g., 22 U.S.C. 3224a), with the territories and, for now, the Trust Territory, clearly intended to be within the former. That is as it should be.

Note that a related 1980 statute that strictly controls the storage of spent nuclear fuel or of high-level radioactive waste in any "territory or possession" of the United States, defined to include the Trust Territory, is not part of this law. The 1980 law appears at 48 U.S.C. 1491, and is discussed in Memorandum No. 48-2.

(jj) The Taiwan Relations Act (22 U.S.C. 3301-3316) was enacted in 1979 as a result of U.S. recognition of the People's Republic of China, which made necessary a modification of the then-existing relationship of the U.S. to the Republic of China (Taiwan). The provisions of the Act affect the territories in the same manner as they affect the U.S. generally. No provisions are of special interest to the territories, except for one that concerns the American Institute in Taiwan, which is authorized to perform certain consular-type functions for U.S. citizens (22 U.S.C. 3306(a)(2)). The Northern Marianas Federal Laws Commission recommended that for the period prior to trusteeship termination, this section be regarded as including citizens of the Northern Marianas, but that action was not taken in Presidential Proclamation 5207 which had that effect on many other Federal laws. It was probably concluded that the section would have limited practical application, and inasmuch as that seems equally true as to American Samoa, the citizenship provision does not appear to require modification.

(kk) The chapter entitled Support of Peace Treaty Between Egypt and Israel (22 U.S.C. 3401-3427), contains the Special International Security Assistance Act of 1979, which provides special military and economic assistance to Egypt and Israel as a result of the Camp David Accords. The chapter contains no provisions of particular interest to the territories.

(ll) The Institute for Scientific and Technological Cooperation (22 U.S.C. 3501-3513), created to encourage such cooperation with the people of "developing countries", expired by law in 1984 (22 U.S.C. 3513). No provision in its charter contained anything of special interest to the territories--who

are not "developing countries" and thus not among the targets of the Institute.

(mm) The Panama Canal chapter (22 U.S.C. 3601-3871) contains the Panama Canal Act of 1979, which implements the treaty with Panama of 1977. It contains nothing of relevance to this study. Some provisions of the Act are confined to U.S. citizens (e.g., 22 U.S.C. 3646, 3647, 3623) but they are unlikely to create a practical problem for either Samoans or people of the Northern Marianas.

(nn) The chapter entitled Foreign Service (22 U.S.C. 3901-4226) contains the Foreign Service Act of 1980 and related statutes. The Foreign Service Act prescribes the personnel system by which Foreign Service officers, and others employed abroad by the Department of State, are appointed, trained, promoted, retired, etc. Only one provision refers explicitly to the subjects of this study: at 22 U.S.C. 4021(c) authority is granted for the training at the State Department's Foreign Service Institute of "citizens of the Trust Territory", such authority to cease with Congressional approval of the Compact. (Thereafter section 122 of the Compact will presumably take its place. Under that section, citizens of the Freely Associated States may be trained at the Foreign Service Institute, as agreed by the pertinent State and the United States.) So far as can be established, no Micronesian has yet studied at the Foreign Service Institute.

Only U.S. citizens may become Foreign Service officers (22 U.S.C. 3903, 3941), a requirement that the Northern Marianas Federal Laws Commission recommended in 1982 be waived as to Northern Marianas citizens for the period prior to trusteeship termination. The citizenship requirement was not waived in the pertinent Presidential Proclamation (No. 5207 of June 7, 1984), either because the requirement was regarded as important, or because waiver would be unlikely to have any practical usefulness.^{5/} The latter rationale may suggest

^{5/} Proclamation 5207, at section 3(b), does waive the citizenship provision in two rather aged and arcane laws here
(continued...)

that the requirement need not be expanded to include U.S. nationals either, for Samoa is not known to have produced any likely Foreign Service officers. In any event, were a U.S. noncitizen national from Samoa seriously interested in the Foreign Service, it seems likely that he or she would have little difficulty qualifying for naturalization as a U.S. citizen.

(oo) Authorities Relating to the Regulation of Foreign Missions (22 U.S.C. 4301-4313) pertain to the establishment of U.S. missions abroad, and to the establishment and operation of foreign missions in the United States--with the "United States" defined to include the territories and possessions of the United States (22 U.S.C. 4302(a)(8)). Thus, the authority here vested in the Secretary of State with respect to foreign missions extends to such missions in the territories as well. (The Trust Territory would not now be included, but there are no foreign missions there at this time.) But that authority would not apply to offices or other establishments of territorial representatives in Washington or elsewhere in the U.S., because they are not "foreign" or diplomatic missions (22 U.S.C. 4302(a)(4)). It might be noted that the requirement that foreign missions in the U.S. have liability insurance coverage (to overcome the long-standing problem arising from diplomatic immunity in the face of automobile accidents), would apply in connection with foreign missions in the territories (22 U.S.C. 4304a).

(pp) The chapter entitled Private Organization Assistance (22 U.S.C. 4401-4413) authorizes grants of Federal funds to the Asia Foundation and to the National Endowment for Democracy, both of which are private, nonprofit corporations.

5/ (...continued)

codified: 22 U.S.C. 4217 (1869), which provides that a consular officer is guilty of embezzlement if he fails to pay over money or property of a U.S. citizen that the consul has earlier received; and 22 U.S.C. 4218 (1803), which makes it a crime for a consular officer to certify that property of a foreigner is property of a U.S. citizen. It does not seem sufficiently likely that noncitizen Samoans could suffer from want of coverage here to warrant updating these laws on their behalf.

No provisions of the chapter are of interest for purposes of this study.

(qq) The Soviet-Eastern Europe Research and Training Act of 1983 (22 U.S.C. 4501-4509) provides Federal support for the establishment of programs to encourage research and knowledge about the Soviet Union and Eastern Europe. There is no statutory language that would serve to exclude institutions or individuals in the territories from participation.

(rr) The United States Institute of Peace Act (22 U.S.C. 4601-4611), enacted in 1984, creates an institution to advance the causes of international peace and conflict resolution with the purpose, among others, of strengthening the relation between "the world of learning and the world of public affairs" (22 U.S.C. 4601(a)(8)). Its services are not confined to U.S. citizens or nationals, appropriately enough (e.g., 22 U.S.C. 4604(b)(1), 4604(g)(2)), and no provision presents any problem for the territories, the Trust Territory, or their people.

Conclusion: The laws contained in Title 22 require no change to meet the needs of the territories or the Trust Territory.

Federal agency comments: Comments were invited from the Departments of State and Justice. The State Department did not respond.

Title 23 - HIGHWAYS

- * Contains matters of particular interest to the territories, but no legislative recommendations.

<u>Memorandum Number</u>	<u>Subject</u>	<u>23 U.S.C. sections</u>
23-1	* (a) Federal-Aid Highways	101-158
	Other Highways	201-219
	General Provisions	301-324
	* (b) Highway Safety	401-408

Memorandum No. 23-1
July 1987

Subject: Title 23 of the United States Code
Highways

(a) Federal-Aid Highways, Chapter 1 (23 U.S.C. 101-158)
Other Highways, Chapter 2 (23 U.S.C. 201-219)

General Provisions, Chapter 3 (23 U.S.C. 301-324)

(b) Highway Safety, Chapter 4 (23 U.S.C. 401-408)

Comment: Federal laws providing assistance to the territories for the construction of roads and highways are adequate to meet territorial needs. The Highway Safety Act also applies fully to the territories.

Discussion: (a) The first three chapters of Title 23, which was enacted into positive law in 1958 (Federal-Aid Highways, 23 U.S.C. 101-158, Other Highways, 23 U.S.C. 201-219, and General Provisions, 23 U.S.C. 301-324), are so interrelated as to lend themselves best to joint treatment. A review of these chapters indicates that pertinent Federal highway laws provide a reasonable, indeed a generous, basis for Federal financial assistance for the construction of roads and highways in the territories of the Virgin Islands, Guam, Samoa, and the Northern Marianas--this as a result of the territorial highway program at 23 U.S.C. 215, and the latest major highway legislation (Public Law 100-17, approved April 2, 1987).

The analysis of Federal highway legislation as it relates to the territories is difficult, owing in part to the fact that not all pertinent laws have been codified, and to the fact that the treatment of the territories has been somewhat untidy over the years. A full history of their treatment is not required here, and it would be extraordinarily hard to reconstruct, but some points of interest emerge:

-- In 1951, the Commission on the Application of Federal Laws to Guam concluded that the Federal Highway Act (the then current law providing funds to the States for highway construction) did not and should not apply to Guam (House Doc. 212, 82d Cong., p. 30). An examination

of the staff document giving rise to this recommendation suggests that the rationale for these conclusions was that Guam's needs were then relatively simple, and the complexities of Federal highway legislation were inappropriate for meeting them.

-- In 1956, the Commission on the Application of Federal Laws to the Virgin Islands reached the same conclusions as to the Federal Highway Act, stating that "The Virgin Islands could not qualify under the stated purposes of this act." (House Interior Committee Print No. 7, 84th Cong., p. 26).

-- (The Northern Marianas Commission on Federal Laws did not deal with highway laws in its 1985 Report, or elsewhere.)

-- During the 1950's and 1960's, Federal aid or grants for road construction in the territories appear to have been handled on an ad hoc basis, with particular projects often being authorized and funded through annual Interior Department appropriations for the territories.

-- In 1966 and again in 1968 the Secretary of Transportation was called upon to make studies of highway needs in the Virgin Islands, Guam, and Samoa (Public Laws 89-574 (1966) and 90-495 (1968)), and to report to Congress upon means of implementing recommended programs. The first of these, Public Law 89-574, in the form in which it passed the House, dealt only with Guam and the Virgin Islands. Samoa was added in the Senate, and all three were accepted by the conferees (1966 U.S. Code Cong. and Admin. News 2843). In the legislative process leading to enactment of Public Law 90-495 in 1968, the Senate passed legislation that would have extended the "entire Federal-aid highway program to Guam," without mentioning the other territories, but the conferees eliminated that provision and asked instead for a further study (1968 U.S. Code Cong. and Admin. News 3545).

-- In 1970, basic highway legislation for all of the then territories--the Virgin Islands, Guam, and Samoa--was first passed, by which section 215 of Title 23 was added (Public Law 91-605). It is interesting to note that the House version of the legislation that became Public Law 91-605 provided Federal highway aid to the Virgin Islands only (1970 U.S. Code Cong. and Admin. News 5431), but the conference committee expanded it to provide for Guam and American Samoa as well (1970 U.S. Code Cong. and Admin. News 5462). Section 215, as enacted in 1970, provided for a Federal contribution for territorial highway construction of 70% of the cost of the project.

-- In 1978, the 70% provision was eliminated so that thereafter, to the present, the Federal contribution for approved territorial highway projects is "100 per centum of the cost of any project" (23 U.S.C. 215(a), Public Law 95-599 (1978), sec. 129(f)). Although the House version of what became Public Law 95-599 would have added the Northern Marianas to section 215 (1978 U.S. Code Cong. and Admin. News 6590), the final legislation did not, dealing only with the raising of the Federal contribution, but the conferees anticipated that the Northern Marianas would be a beneficiary of Federal-highway aid (1978 U.S. Code Cong. and Admin. News 6704), and a reference to the Northern Marianas was added to 23 U.S.C. 120(i), which deals with the Federal share.

-- Highway legislation in 1983 provided a new approach to funding for the territorial program. No funds were then authorized under 23 U.S.C. 215, but instead the Virgin Islands, Guam, Samoa, and the Northern Marianas were thereafter to be viewed as constituting together one "State," and there was guaranteed to them, collectively, by way of an annual apportionment each year 1/2 of one percent of all funds appropriated that year for the Federal-aid primary highway system--i.e., the amount appropriated for all of the States, the District, and Puerto Rico, each of which was guaranteed at least 1/2 of one percent (Public Law 97-424, sec. 108(d); 1982 U.S. Code Cong. and Admin. News 3698). This approach was hailed at the time by the Delegates from Guam and the

Virgin Islands as providing "for the first time a guaranteed source of funding" for territorial roads (Virgin Islands' Delegate Fact Sheet, July 1984; Guam's Delegate Fact Sheet, Fall 1984). Obviously, by this means the territories were assured of Federal highway aid. Section 215 constituted (and still constitutes) an authorization only, without funds inevitably following it, but annual funding for the States could be counted on, and the territories would share. Obviously, too, judged on a population basis (with the territories now having together about a quarter million population) 1/2 of one percent is generous.

-- The multi-year authorization contained in the 1983 legislation having expired, new legislation became necessary, and it was enacted in early 1987. That legislation, Public Law 100-17, finally amends section 215 by adding the Northern Marianas to the Virgin Islands, Guam, and Samoa as eligible recipients (sec. 133(b)(15)). (The treatment of the Northern Marianas before 1987 was spotty in the Federal highway laws, but it is now included in all statutory references to the territories so all four territories are treated equally.)

Although an examination of Title 23 as it currently exists, plus Public Law 100-17, make it difficult to discern, the current state of the law is that 23 U.S.C. 215 constitutes the basic authorization for Federal highway aid to the territories, but funds are not appropriated for the territories pursuant to it. Funds are instead appropriated pursuant to 23 U.S.C. 103(b), which provides for the Federal-aid primary system; and the territories continue to be treated together as one "State" (as in the 1983 legislation described above), with a guarantee of an apportionment of 1/2 of one percent (for all of them collectively) of the amount annually appropriated for the primary system--this as a result of section 107 of Public Law 100-17, which perpetuates through fiscal year 1991 the collective treatment first provided for in the 1983 law.

As a result, the territories are guaranteed highway money each year at a level that can reasonably be viewed as generous.

The program provided for by 23 U.S.C. 215 is tailored to their needs. Among other things, the territorial highway program

- provides for assistance to each of the four territories in "the construction and improvement of a system of arterial highways, and necessary inter-island connectors designated by the Governor of each territory and approved by the Secretary" of Transportation;
- provides for "a Federal contribution of 100 percentum of the cost of any project";
- permits the Secretary of Transportation to provide technical assistance to territorial highway agencies;
- prohibits the use of Federal highway funds for maintenance of the highway system (a provision consistent with the general requirement at 23 U.S.C. 116 that the States provide maintenance for roads that are part of the Federal-aid system); and
- permits the Secretary of Transportation to waive the application to the territorial highway program of provisions applicable generally to Federal-aid primary highway funds, if they are inconsistent with the territorial authorization under 23 U.S.C. 215.

In sum, the territories are treated well under the current Federal-aid highway laws. They are not treated as "States," a term defined to exclude them (23 U.S.C. 101), and as a result they are not bound by mileage limitations that would otherwise apply (23 U.S.C. 103(b)(1)) and which would almost certainly lead to illogical results; they are not restricted to receiving only 75% of the cost of the project, which is the ceiling that generally applies to the Federal-aid primary system (23 U.S.C. 120(a)); nor are they bound by the usual apportionment formula (based on, among other things, total

area, rural population, urban population, and mileage of mail delivery routes, as described in 23 U.S.C. 104(b)(1)). The apportionment formula, which seems to have frightened the Guam and Virgin Islands Commissions in the 1950's, would probably prove impossible of application to the territories today. The special authority for the territories at 23 U.S.C. 215 is, therefore, far more appropriate for their needs, and the virtual guarantee of annual funding, described above, results in a state of the law that is both unusual and laudable from the territories' standpoint.

As a result of the 1987 legislation, the territories are accorded the same treatment as the "States" in connection with emergency relief from damage occasioned by a natural disaster or "catastrophic failures from any external cause" (23 U.S.C. 125(a)). Section 118(b) of Public Law 100-17 provides for their inclusion in this program, with an annual ceiling of \$5 million that applies to the Virgin Islands, Guam, Samoa, and the Northern Marianas, collectively.

(b) The chapter entitled Highway Safety (23 U.S.C. 401-408) contains the Highway Safety Act, and it applies fully to the territories. The section that provides for Federal financial assistance to the States in carrying out highway safety programs (23 U.S.C. 402(c)), refers expressly to the apportionment to the Virgin Islands, Guam, American Samoa, and the Northern Marianas--the Northern Marianas having been added in 1987 as a result of amendments contained in sections 133(b)(19) and (20)(B) of Public Law 100-17. But the Northern Marianas participated in the program before that--possibly on the theory that section 502(a)(2) of the Covenant operated to make the law applicable there. In any event, an Interior Department study of Federal grant programs in 1979 (the latest available) shows that even then all four areas--the Virgin Islands, Guam, Samoa, and the Northern Marianas--were receiving Federal assistance for their highway safety programs. There is, thus, no question as to the inclusion of the territories in the law.

The highway safety program required of each State and territory must meet detailed Federal standards (23 U.S.C. 402(a)), but none appear to be beyond the reach of the

territories. Although each program is required to make provision for the expenditures of some Federal funds by political subdivisions of the "State" (23 U.S.C. 402(b)(1)(C)) --something most of the territories do not have--a waiver authority given the Secretary of Transportation would provide a means of overcoming that problem (23 U.S.C. 403(b)(2)). In any case, no territory is known to have complained about any difficulty arising from this provision. Funds are apportioned on the basis of population and road mileage, but the four territories are guaranteed "not . . . less than one quarter of 1 per centum of the total apportionment" (23 U.S.C. 402(c)). Given the territories' populations and road mileages, this floor should be viewed as quite generous.

Grants for particular programs are authorized, and the territories are eligible for them: for school bus driver training (23 U.S.C. 406), for innovative projects for highway safety (23 U.S.C. 407), and for meeting problems arising from drivers under the influence of alcohol or a controlled substance (23 U.S.C. 408).

Conclusion: Unlike many of the Federal laws explored in this study, the Federal-aid highway laws not only apply to the territories, but make provision for them in a way that is both generous and sensitive to their peculiar needs. These laws require no modification.

Federal agency comments: Comments were requested from the Department of Justice and the Federal Highway Administration of the Department of Transportation. In a letter of December 31, 1987, an Assistant General Counsel of the Federal Highway Administration concurred in the discussion of the highway laws set forth above, but suggested that the matter of funding for the Federal-aid highway program be mentioned. The letter states:

The Federal-aid Highway Act of 1956, coupled with the Highway Revenue Act of 1956 of that same year (P.L. 627, 70 Stat. 374) established the Highway Trust Fund as the mechanism for financing the highway program. It is funded wholly from highway

user taxes on a "pay as you go" basis. The taxes are derived from gasoline, special fuels and lubricating oil used for highway purposes, the sale and highway use of trucks, buses, etc., and highway tires. Thus, it would appear appropriate to discuss whether the citizens of the four territories and Puerto Rico pay or should pay into the Highway Trust Fund the same as citizens of the United States pay to receive the benefits of highway construction. For example, I know that citizens of Puerto Rico do not pay federal gasoline taxes. The question to be addressed is whether the citizens of the United States should bear the tax burden for the benefit of citizens of the territories and Puerto Rico. In 1956 it was the intent of Congress as expressed in section 209(6)(2) of the Federal-aid Highway that if it hereafter appears that:

. . . the distribution of tax burden among the various classes of persons using Federal-aid highways, or otherwise deriving benefits from such highways is not equitable, the Congress shall enact legislation in order to bring about a balance of total receipts and total expenditures, or such equitable distribution, as the case may be.

In 1983, with the passage of the STAA of 1982 (P.L. 97-424, Jan. 6, 1983), section 157 was added to Title 23 U.S.C. requiring a minimum allocation to each state of at least 85 percent of the estimated tax payments attributable to highway users in that state paid into the highway trust fund. Section 124 of the STURA of 1987 (P.L. 100-17, Apr. 2, 1987) amended section 157 to assure that it would be permanent law and to add to the categories of allocations or appropriations of highway funds to which this provision applies.

Section 157 represents a statement of the intent of Congress that tax receipts and tax expenditures in a state should be more equitably distributed. This is of interest to and could have an impact on Puerto Rico and the U.S. territories now or in the future.

The Federal gasoline tax (26 U.S.C. 4081) also does not apply to the Virgin Islands, Guam, Samoa, or the Northern Marianas. The provisions of the Internal Revenue Code that impose the gasoline excise tax contain no indications of the geographic application of the tax (26 U.S.C. 4081-4084), but a related provision concerning the inspection of records pertaining to the tax refers to officers of a "State." For purposes of the Internal Revenue Code generally, the term "State" does not include the territories or Puerto Rico (26 U.S.C. 7701(10)), and the term "United States" similarly excludes them (26 U.S.C. 7701(9)). Thus, in the absence of language making particular Federal taxes applicable in the territories (such as those cited at 26 U.S.C. 7655), it is usually correct to conclude that the particular Federal tax in question does not apply in the Virgin Islands, Guam, Samoa, or the Northern Marianas. That is the correct conclusion as to the Federal gasoline tax.

Commonwealth of Puerto Rico v. Blumenthal, 642 F.2d 622 (1980) is consistent with that conclusion, although it dealt only in passing with the question of the application within Puerto Rico or the Virgin Islands of the gasoline tax. It dealt essentially with the question whether Federal excise taxes paid on gasoline shipped to "the United States" from Puerto Rico and the Virgin Islands were required to be covered over to the treasuries of those governments, and it concluded that they were not.

The other Federal taxes referred to in the Highway Administration letter quoted above are discussed in Memorandum No. 26-4.

A lengthy and detailed letter dated May 31, 1988, to the Interior Solicitor's Office from the Associate Chief Counsel,

Technical and International, of the Internal Revenue Service (CC:UNTL-200-88) confirms the conclusion that the gasoline excise tax does not apply in the territories.

As a result of the foregoing discussion, it is clear that the territories not only receive unusually generous treatment under the highway laws--by which they receive financial assistance that is relatively larger than that to which the States are entitled--but they receive that treatment without making contributions under the Federal gasoline excise tax to the Highway Trust Fund. In that manner, too, they are more favorably treated than the States.

Title 24 - HOSPITALS, ASYLUMS, AND CEMETERIES

- Contains nothing of substantial interest to the territories or the Trust Territory.
- * Contains matters of interest to the territories and the Trust Territory, but no legislative recommendations.

<u>Memorandum Number</u>	<u>Subject</u>	<u>24 U.S.C. sections</u>
24-1	- (a) Navy Hospitals, and others	1-37
	- (b) The Soldiers' and Airmen's Home	41-60
	- (c) The National Home for Disabled Volunteer Soldiers	151-154
	* (d) Saint Elizabeths Hospital	161-221
	- (e) National Cemeteries	295a
	- (f) Gorgas Hospital	301-302
	* (g) Hospitalization of Mentally Ill Nationals Returned from Foreign Countries	321-329

Subject: Title 24
Hospitals, Asylums, and Cemeteries

- (a) Navy Hospitals, and Others
Title 24, Chapter 1 (24 U.S.C. 1-37)
- (b) The Soldiers' and Airmen's Home
Title 24, Chapter 2 (24 U.S.C. 41-60)
- (c) The National Home for Disabled Volunteer Soldiers
Title 24, Chapter 3 (24 U.S.C. 151-154)
- (d) Saint Elizabeths Hospital
Title 24, Chapter 4 (24 U.S.C. 161-221)
- (e) National Cemeteries
Title 24, Chapter 7 (24 U.S.C. 295a)
- (f) Gorgas Hospital
Title 24, Chapter 8 (24 U.S.C. 301-302)
- (g) Hospitalization of Mentally Ill Nationals Returned
from Foreign Countries
Title 24, Chapter 9 (24 U.S.C. 321-329)

Comment: The statutes considered herein provide benefits to individuals because of their status, rather than because of their geographical location, and they are largely silent as to their territorial application. None of these statutes present any serious problem to the territories or the Trust Territory, however, and no modifications of them appear to be necessary.

Discussion: (a) The laws here codified concerning Navy hospitals, Naval homes, the Army and Navy Hospital (in Arkansas), and hospital relief for seamen and others (24 U.S.C. 1-37) relate to the administration of these facilities--for, among others, "decrepit Navy officers" (24 U.S.C. 14). They contain no exclusionary provisions or other provisions of a sort that might be troublesome to the territories or the Trust Territory.

(b) Laws concerning the Soldiers' and Airmen's Home (24 U.S.C. 41-60) in the District of Columbia also relate to administration of the facility and present no problems to the territories and the Trust Territory.

(c) Excepting only a 1906 statute concerning a military sanitarium in South Dakota (24 U.S.C. 151-154), this Chapter on the National Home for Disabled Volunteer Soldiers has been repealed.

(d) Saint Elizabeths Hospital (24 U.S.C. 161-221), a hospital established in 1855 in the District of Columbia for the treatment of the mentally ill, is managed under the statutes here collected. In two particulars, these statutes are of interest in the territories:

--24 U.S.C. 196b authorizes the Secretary of Health and Human Services, upon "the application of the Governor of the Virgin Islands," to provide for the treatment at U.S. expense at Saint Elizabeths of mentally ill patients from the Virgin Islands. The transfer of Virgin Islands patients to Washington under this authority, which dates from 1940, has been much criticized over the years, and was the subject of especially adverse comment both officially and unofficially as recently as 1981. Because the Virgin Islands in 1983 opened new hospital facilities, these transfers are expected to cease. Because this law is an authorization only, activated at the initiative of the Governor of the Virgin Islands, it would not stand in the way of other approaches to the care of the mentally ill of the Virgin Islands, and it thus need not be amended or repealed.

--24 U.S.C. 212 through 214, authorize the care at U.S. expense of persons (a) convicted in Federal courts but (b) imprisoned in "State" institutions and (c) who are or who become mentally ill. They may either be transferred to Saint Elizabeths or cared for in a "State" institution, at Federal expense. The use of the term "State" may be limiting, and could result in the exclusion of the territories, but this is not inevitable, given the age of the pertinent law (1874) and the possibility that the Congress may have legislated a bit

carelessly with respect to non-State areas. (A "Territory" is referred to in 46 U.S.C. 212, but not in 213 or 214). In any event, the U.S. Attorney General has available to him now more modern authority (e.g., 18 U.S.C. 4002) which would permit him to deal intelligently with such a problem in a territory as well as a State, so no change in these 1874 laws is required.

(e) All that remains unrepealed in the chapter concerning National Cemeteries is a 1960 law relating to the Arlington Memorial Amphitheater (24 U.S.C. 295a), which is irrelevant for current purposes.

(f) The Gorgas Hospital in Panama (24 U.S.C. 301-302) is also irrelevant.

(g) A 1960 law provides for the hospitalization of mentally ill nationals returning from foreign countries (24 U.S.C. 321-329). The hospitalization is to be provided by the Secretary of Health and Human Services, at the request of the Secretary of State. Such patients are to be returned to their own jurisdictions or to relatives in due course, and may be required to contribute toward the costs of care and treatment.

The beneficiaries of the statute would almost certainly

--include the people of Guam and the Virgin Islands (who, as citizens of the United States, are nationals of the United States as well);

--include the people of Samoa (who are largely noncitizen nationals);

--exclude the people of the Trust Territory (who are aliens); and

--leave somewhat unsettled for purposes of this law the status of the people of the Northern Marianas.

The people of the Northern Marianas are not yet either citizens or nationals of the United States. They will become both upon termination of the trusteeship, and they are being treated as U.S. citizens now for purposes of a number of Federal statutes. Section 19 of Public Law 98-213, approved December 9, 1983, permits the President by Proclamation to waive, for the period prior to trusteeship termination, and with respect to citizens of the Northern Marianas, the statutory requirement of U.S. citizenship or nationality if the statute is among those listed in the 1982 Interim Report to the Congress of the Northern Marianas Commission on Federal Laws. This 1960 statute was not so listed, reportedly because the requirement runs to nationality instead of citizenship, which is somewhat unusual under Federal law. Section 19, however, authorizes the addition of statutes to the list if it "appears from the content that they were inadvertently omitted," and it seems probable that it could be so argued with respect to this 1960 law, if the need for its benefits for Northern Marianas travelers were to be shown.

Oddly, the statute defines "State" to mean "a State or Territory of the United States, the Commonwealth of Puerto Rico, or the District of Columbia" (24 U.S.C. 321(c)). Strictly speaking, the U.S. had no "Territory" on July 5, 1960, the date of approval of the statute, and by most tests it did not on June 19, 1959, the date on which the Secretary of HEW transmitted the proposed legislation to the Congress. By an earlier 1959 date, the Congress had passed Statehood legislation for both Alaska and Hawaii, and the U.S. then had no more "Territories" (meaning incorporated territories, destined for ultimate Statehood), for Alaska and Hawaii were the last. (Hawaii was not technically admitted to the Union until August 21, 1959, when the appropriate Presidential Proclamation was issued; Alaska had been admitted on January 3, 1959).

But it is of course often proper to define "Territory" to include a "territory," using the rationale provided in Puerto Rico v. Shell Oil Co. (302 U.S. 253 (1937)), and it seems reasonable to do so in this case, given the humanitarian purpose of the law. In that event, the Virgin Islands, Guam, and American Samoa would be included in the coverage of the

law. The Northern Marianas would be included as a matter of geography, given section 502(a)(2) of the Northern Marianas Covenant, for the law applies to Guam and generally to the states as well. Coverage of Northern Marianas citizens could turn on the application of section 19 of Public Law 98-213, as discussed above. In any event, there seems no need to amend the statute because the problem can probably be overcome administratively, by a Presidential Proclamation, if there is a need to do so; and because at worst the problem is temporary and will be eliminated upon trusteeship termination.

Conclusion: The statutes contained in Title 24 of the U.S. Code require no change to accommodate the territories and the Trust Territory.

Federal agency comments: The subjects of this memorandum do not require comment by relevant Federal agencies.

Title 25 - INDIANS

- Contains nothing of substantial interest to the territories or the Trust Territory.

Memorandum
Number

Subject

25 U.S.C.
sections

25-1

- Indians

1-2307

Subject: Title 25 of the United States Code
Indians (25 U.S.C. 1-2307)

Comments: None of the laws contained in Title 25 has either application or relevance to the territories or the Trust Territory.

Discussion: The laws contained in Title 25 relate to the administration of Indian affairs, largely by the Secretary of the Interior, but with respect to health, by the Secretary of Health and Human Services; and to the property and authority of particular Indian tribes, bands, or groups.

The title contains no all-purpose definition of "Indian," but it is clear from particular definitions of the term for particular purposes that the indigenes of the territories or the Trust Territory are not comprehended by the term (e.g., 25 U.S.C. 450b, 479, 1452, 1603). Although some of the definitions are frustrating in their circularity (e.g., 25 U.S.C. 1801), it is also evident that standard practice results in "Indians" being those within the States--and formerly the Territory of Alaska.

One section of the Title permits the Secretary of the Interior to lease certain mineral lands on Indian reservations to U.S. citizens only (25 U.S.C. 399). This deprivation to the Samoans is unlikely to be troublesome to them, and it may, therefore, for the purpose of this study be ignored.

Conclusion: The laws pertaining to Indians do not apply to the territories or the Trust Territory, and they require no change.

Federal agency comments: None appears necessary.

Title 26 - INTERNAL REVENUE CODE

- Contains nothing of substantial interest to the territories.
- * Contains matters of particular interest to the territories, but no legislative recommendations.

<u>Memorandum Number</u>	<u>Subject</u>	<u>26 U.S.C. sections</u>
	Prefatory Comment	
26-1	Income Taxes (Subtitle A)	
	* (a) Normal Taxes and Surtaxes	1-1399
	* (b) Tax on Self-Employment Income	1401-1403
	* (c) Withholding of Tax on Nonresident Aliens and Foreign Corporations	1441-1464
	- (d) Rules Applicable to Recovery of Excessive Profits on Government Contracts	1481-1482
	- (e) Tax on Transfers to Avoid Income Tax	1491-1494
	- (f) Consolidated Returns	1501-1564
26-2	* Estate and Gift Taxes (Subtitle B)	2001-2663
26-3	Employment Taxes (Subtitle C)	
	* (a) Federal Insurance Contributions Act	3101-3127
	- (b) Railroad Retirement Tax Act	3201-3233
	* (c) Federal Unemployment Tax Act	3301-3311
	- (d) Railroad Unemployment Repayment Tax	3321-3323
	* (e) Collection of Income Tax at Source of Wages	3401-3406
	- (f) General Provisions Relating to Employment Taxes	3501-3509
26-4	* Miscellaneous Excise Taxes (Subtitle D)	4001-5881
	* Alcohol, Tobacco, and Certain Other Excise Taxes (Subtitle E)	5001-5881
26-5	- (a) Procedure and Administration (Subtitle F)	6001-7872
	- (b) The Joint Committee on Taxation (Subtitle G)	8001-8023
	- (c) Financing of Presidential Election Campaigns (Subtitle H)	9001-9042
	- (d) Trust Fund Code (Subtitle I)	9500-9602

January 1989

Prefatory Comment - Title 26

A study that purports to examine all of the permanent laws of the United States, as this one does, cannot ignore Title 26 of the U.S. Code, the Internal Revenue Code. The interest of completeness requires that some attention be paid to it here; but the interest of common sense requires that it be dealt with differently from other Titles of the U.S. Code in this study. That is so because the Federal tax laws are unique in their complexity, and their proper analysis--even for the limited purpose of establishing their impact on the territories and discovering inadequacies in their treatment of the territories--requires special expertise. Because the preparer of this study does not pretend to that expertise, the memoranda that follow on Title 26 differ from all others in this study. They are not critical analyses, leading to recommendations for changes in the law to effect improvements. They accordingly contain neither a statement of "Conclusion" nor an entry labeled "Recommendation."

What these memoranda do provide is a summary statement, for a nonexpert by a nonexpert, on how in a general way each major part of the Internal Revenue Code applies to each territory--the Virgin Islands, Guam, Samoa, and the Northern Marianas--with references from time to time to particular provisions of likely interest to the territories. (The Internal Revenue Code refers to them as "possessions," and that word, thus, often appears in the following memoranda; but it is not embraced generally in this study, the term "territories" being widely preferred and usually used, at least outside of Federal statutes.)

Informal comments have been sought from the Internal Revenue Service, but the IRS has been particularly advised, as have all other Federal agency commentators on memoranda in this study, that its "official" position is not being sought. Moreover, the IRS commentators have been encouraged to review these memoranda essentially with a view toward discovering major errors, but without itself performing research in depth to permit its concurrence in (or correction of) the innumerable legal conclusions stated. For the IRS to do more would be to require time and professional resources quite out of proportion to the benefits to be gained. (This point is stated early in Memorandum No. 26-4; it could be repeated in each memorandum on Title 26.) Accordingly, the memoranda that follow carry no imprimatur from the Internal

Title 26
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Revenue Service. They do reflect such IRS comments as have been received, following such level of review as seemed reasonable in the circumstances.

Memorandum No. 26-1
February 1989
Revised January 1991

Subject: Income Taxes
(Title 26, Subtitle A, 26 U.S.C. 1-1564)

Comment: The Federal income tax laws do not apply in the territories in the same manner as they apply in the States and the District of Columbia, but as a result of Federal and other laws that are separate from the Internal Revenue Code, the Federal income tax laws apply, and result in a separate territorial income tax, in each of them--the Virgin Islands, Guam, American Samoa, and the Northern Marianas.

Discussion: (a) Normal Taxes and Surtaxes (26 U.S.C. 1-1399)

In General: Chapter 1, entitled "Normal Taxes and Surtaxes", of Subtitle A ("Income Taxes" of Title 26 (the Internal Revenue Code) contains the bulk of the laws commonly referred to as the "Federal income tax laws". Under the terms of the Internal Revenue Code, these laws apply, as such, to individuals and corporations in the "United States"--a term defined for purposes of the Internal Revenue Code to mean the States and the District of Columbia only (26 U.S.C. 7701(a)(9)). But the "income tax laws in force in the United States" have been made applicable by other law to each of the territories, where they apply as a local territorial income tax. Each territorial income tax is administered by local authorities--not by the Federal Internal Revenue Service--and the proceeds are retained by the territorial treasuries.

Although that much is true as to each, there are peculiarities in each that require separate discussion.

The Virgin Islands: In the Naval Service Appropriation Act, 1922, the U.S. Congress provided that

The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the

United States, except that the proceeds of such taxes shall be paid into the treasuries of said islands . . . (48 U.S.C. 1397).

A series of administrative decisions of the U.S. Treasury Department followed (for there was almost no litigation concerning the Virgin Islands income tax for the first several decades of its existence), holding that the quoted provision resulted in a separate territorial income tax, containing the same rates as the Federal income tax, to be collected by officials of the territorial government, with the proceeds to be deposited in the territorial treasury. These early decisions, later fortified by court decisions, held that the Naval Service Appropriation Act created a "mirror system" of taxation, so that the "Virgin Islands" was to be substituted for the "United States" in the tax laws, where appropriate, when the tax was administered as a territorial tax law. And the reverse was also true: because the "possessions" of the United States are generally treated as foreign countries for purposes of the Internal Revenue Code, so the "United States" would be generally treated as a foreign country for purposes of the Virgin Islands territorial income tax. U.S. residents and corporations thus became nonresident aliens and foreign corporations for purposes of the territorial income tax.

The mirror system, as so described, gave rise to numerous inequities and almost endless technical problems in the Virgin Islands (and Washington), a few of which the Congress attempted to deal with before 1986, when it enacted major modifications in the Tax Reform Act of 1986. Before 1986, the U.S. Congress did not often legislate with respect to the Virgin Islands territorial income tax. But in 1954, in section 28(a) of the Revised Virgin Islands Organic Act, Congress attempted to resolve some of the problems faced by a Virgin Islands taxpayer who, if he had income from both U.S. and Virgin Islands sources, was then required to file tax returns with both governments. The taxpayer sometimes had difficulty in establishing the source of his income. Congress undertook to eliminate that problem by providing in section 28(a) that an "inhabitant" of the Virgin Islands could satisfy his income tax obligations under U.S. tax law by paying a tax "on income derived from all sources," world-wide, to the Virgin Islands Government (48 U.S.C. 1642). The provision

seemed easy, but it too resulted in inequities and technical questions, and in some tax avoidance as to the United States. The 1986 Tax Reform Act modified (but did not simplify) the provision by enacting a new section on U.S.-Virgin Islands tax coordination, at 26 U.S.C. 932. The 1954 "inhabitant" provision was replaced as to individuals by the 1986 Act, which substituted the "bona fide resident" rules found in 26 U.S.C. 932.

In 1960 Congress dealt, for the first time, with the tax consequences of the Virgin Islands' locally-enacted industrial incentive program, a program that had been in effect for some years and that had attempted to encourage territorial economic development by providing tax exemptions and tax subsidies to business enterprises. Congress enacted limitations upon the extent to which tax subsidies could be provided by the territory, and those limitations, since amended and appearing at 26 U.S.C. 934, provide generally that subsidies must be confined to income from sources within the Virgin Islands, or to income connected with trade or business in the Virgin Islands.

Congress also dealt with another major consequence of the mirror system in 1976, when it permitted the Virgin Islands Legislature to impose a surtax of 10% on the amount owed as an annual income tax to the Virgin Islands Government. Federal tax law changes in the 1970's reduced income tax rates, and this had the effect of reducing the income tax revenue received by the Virgin Islands territorial treasury (among other territorial treasuries). In the absence of express statutory authority, the territory could not modify the territorial income tax law, nor arguably, could it impose an additional income tax, because the Virgin Islands income tax is a creature of Federal law, susceptible to amendment only by the United States. The surtax authority (appearing as a proviso to 48 U.S.C. 1397) was therefore enacted to permit the raising of additional income tax revenue by the Virgin Islands, but it has not in the intervening years been used. Instead the Congress from time to time in the late 1970's appropriated to the territory lump sums in annual appropriation acts, in an attempt to recompense the territorial treasury for revenue "lost" as a consequence of reduced Federal tax rates.

Unlike the other territories, discussed below, the Virgin Islands has concluded that the mirror system of taxation functions effectively for its purposes, and thus that the territorial income tax should not be "de-linked" from the Federal system. The Virgin Islands thus, alone among the territories, is not authorized by the 1986 Tax Reform Act to enact its own tax laws. Section 1277(c) of the 1986 Act does require the Virgin Islands to enter into an implementing agreement with the United States, in order to bring into effect new provisions of the Federal tax law that are favorable to the Virgin Islands (see note following 26 U.S.C. 931), and that agreement has been executed. Most importantly, the 1986 Act attempts also to deal with some of the inequities and loopholes of the mirror system, by prescribing certain new rules concerning the relationship between the Virgin Islands territorial income tax and the U.S. income tax (26 U.S.C. 932, 934).

Guam: With the enactment in 1950 of the Guam Organic Act, Guam was placed in a position that paralleled the Virgin Islands at that time. Section 31 of the Organic Act provided in its entirety:

The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

Section 30 provided (and still provides, at 48 U.S.C. 1421(h) that the proceeds of the income tax would be covered into the treasury of Guam.

Unlike the Virgin Islands, however, Guam was faced with immediate lawsuits over the meaning of its section 31, and those lawsuits continued until the Congress in 1958, recognizing that Guam was "harassed by litigation" (1958 U.S. Code Cong. and Admin. News 3647), enacted legislation (Public Law 85-688) that was intended to spell out what section 31 meant. That spelling out appears at 48 U.S.C. 1421i, where eight subsections in effect state in statutory language what

had earlier been the administrative rules governing both the Virgin Islands and Guam income taxes. Among other things, the subsections define the "income tax laws in force in Guam," and provide that "Guam" is to be substituted for the "United States," except "where it is manifestly otherwise required." Section 2 of the 1958 legislation makes clear its purpose: Congress declared that the clarifying subsections expressed "the true intendment of said section 31," as though section 31 before the 1958 amendment had meant just what it said after its amendment. Litigation was thereafter reduced, but not eliminated.

In 1977 Congress authorized the Legislature of Guam to levy the same 10% surtax on income that it had earlier allowed for the Virgin Islands (48 U.S.C. 1421i(a)), but in Guam's case too the authority has not been used. Guam also received for several years lump sums in annual appropriation acts to compensate it for reduced territorial revenues, resulting from reduced Federal tax rates.

Congress does not appear to have otherwise legislated uniquely for Guam and its territorial income tax (except for the former 26 U.S.C. 935, which was repealed in 1986, with the repeal to become effective at such time as Guam enters an implementing agreement with the United States under section 1271 of the Tax Reform Act of 1986, but such an agreement is not, as of January 1991, in effect). But Congress has dealt importantly with Guam, along with other areas, in connection with the income tax delinkage authorized in 1986, with the "possession tax credit" at 26 U.S.C. 936, and with certain other matters, discussed below.

American Samoa: Unlike the Virgin Islands, Guam, and the Northern Marianas, each of which has, as a result of Federal law, a territorial income tax measured by the Federal income tax--the so-called mirror system--American Samoa has the same mirror system territorial income tax, but as a result of territorial law. The Legislature of American Samoa in 1963 enacted legislation parallel to the Virgin Islands and Guam provisions quoted above. The American Samoan Code provides at section 11.0403(a) that

The income tax and the income tax rules in force in the United States of America and those which may hereafter be enacted or adopted, where not clearly inapplicable or incompatible with the intent of this section, are adopted by American Samoa, and shall be deemed to impose a separate territorial income tax, payable to the government.

There follow a number of provisions in the Samoan Code that are similar to those contained in the several subsections of Guam's 1958 legislation, referred to above. Because American Samoa's tax code is not a "mirror" of the Internal Revenue Code, it has been treated as "foreign" to the U.S., thereby avoiding much confusion and litigation, but forcing taxpayers with dual-source income to file two tax returns. In addition, because Samoa had authority to enact its own income tax law--unlike the Virgin Islands, Guam, and the Northern Marianas, where the income tax laws now in effect are creatures of Federal law, and thus not susceptible to territorial amendment--Samoa has enacted a few changes to tailor the Federal income tax laws to its own situation. Most notably it has provided an "alternate minimum tax," in recognition of the relatively low income of most Samoans. That tax, provided for in section 11.0503 of the Samoan Code, provides that

In the case of a taxpayer other than a corporation, if an amount equal to 2% of the adjusted gross income exceeds the regular tax for the taxable year then there is imposed a tax equal to such excess.

Samoa has also repealed the earned income credit.

There are no Federal laws pertaining to the Samoan income tax, other than those applying to other territories as well, discussed below.

Northern Marianas: The Northern Marianas Covenant contains the following section pertaining to income taxes:

Section 601.(a) The income tax laws in force in the United States will come into force in the Northern Mariana Islands as a local territorial income tax on the first day of January following the effective date of this Section, in the same manner as those laws are in force in Guam.

(b) Any individual who is a citizen or a resident of the United States, of Guam, or of the Northern Mariana Islands (including a national of the United States who is not a citizen), will file only one income tax return with respect to his income, in a manner similar to the provisions of Section 935 of Title 26, United States Code.

(c) References in the Internal Revenue Code to Guam will be deemed also to refer to the Northern Mariana Islands, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof or of this Covenant.

Section 602 permits the Government of the Northern Marianas to impose such additional taxes as it deems appropriate, and to "rebate any taxes received by it," except that its power to rebate the territorial income tax is limited to taxes on income from sources within the Northern Marianas. All Federal income taxes derived from the Northern Marianas, as well as the proceeds of the Northern Marianas territorial income tax, are paid into the treasury of that Government, under section 703(b) of the Covenant.

The Covenant, thus, contemplated that the Northern Marianas and Guam would receive parallel income tax treatment.

As earlier noted, 26 U.S.C. 935, which is referred to in Covenant section 601(b), was repealed in 1986, with the repeal to become effective when an implementing agreement is entered by the pertinent territorial government and the United States. The Northern Marianas has not entered into such an agreement, as of January 1991. Section 935 permits Guam residents (and Northern Marianas residents) to file a single tax return with the Government of Guam (or the Northern Marianas) with respect to tax liability to both Guam (or the Northern Marianas) and the United States. When section 935 is effectively repealed, it will be replaced by 26 U.S.C. 931, the effect of which is to require residents of Guam, the Northern Marianas, and Samoa to file tax returns with the U.S. if they have income from outside their respective territories. But section 931 does not become effective as to any of the three named areas until there is in effect, and only for so long as there is in effect, an implementing agreement under the 1986 Tax Reform Act (discussed below under "De-linkage"). Such an agreement is now in effect with respect to Samoa; one was executed, to become effective on January 1, 1991, as to Guam, but in December 1990 its effectiveness was postponed to a date uncertain (but related to the foreseen development of Guam's own tax law); the Northern Marianas has not yet moved toward an agreement.

As to the effective date referred to in section 601(a), inasmuch as that section became effective on January 9, 1978, the income tax laws were to "come into force" in the Northern Marianas on January 1, 1979. The territorial income tax did not go into effect, however, on that date. The Northern Marianas expressed misgivings about the tax, and the Congress through a series of actions (section 205(a) of Public Law 96-205, section 303(a) of Public Law 96-597, and section 3(a) of Public Law 98-213) postponed the effective date of the Northern Marianas territorial income tax as it pertained to income from sources within the Northern Marianas, ultimately until January 1, 1985. There soon arose as well a controversy over action taken by the Northern Marianas Legislature in 1979 to provide a "rebate" of 100% of the tax due on income from sources within the Northern Marianas, with payment of the tax

before rebate generally not being required. The Congress reacted adversely, in due course providing (in section 3(b) of Public Law 98-213 (1983)) that a "rebate" could apply only with respect to taxes actually paid. (A full discussion of the "abate vs. rebate" controversy, along with other issues that arose during that period of 1979 to 1985, appears in the August 1985 Report of the Northern Marianas Commission on Federal Laws, pages 438-444.)

The Northern Marianas Territorial Income Tax--employing the same mirror system that exists in the Virgin Islands and Guam --became effective on January 1, 1985. Local law in the Northern Marianas now permits the rebate of 95% of the tax actually paid on income from sources within the Northern Marianas. (The 95% applies to "the first \$7,500,00 of tax paid;" a 50% rebate applies to taxes paid in amounts between \$7,500,000 and \$20,000,000; and 25% for amounts in excess of \$20,000,000 (4 Commonwealth Code 1708(b)(1)).)

In recognition of the obvious difficulties that a small government would have in administering a tax law as complex as the Federal income tax law, the Congress provided in 1978, in section 3(d) of Public Law 95-348 (note following 48 U.S.C. 1681), that the Secretary of the Treasury was required to administer and enforce the Northern Marianas territorial income tax, at no cost to the Northern Marianas, if the Governor so requested pursuant to legislation enacted by the Northern Marianas Legislature. Subsequent correspondence on the subject, however, between Northern Marianas officials and the Treasury Department, resulted in the Northern Marianas' decision not to make the request--because the Treasury Department stated that it would perform the service only if it had full authority to do so, and the Government of the Northern Marianas was unwilling to surrender all of its power over administration and enforcement of the tax law.

Except for provisions discussed above and other provisions of the Internal Revenue Code that refer to the Northern Marianas along with other territories--some of which are discussed below--the Congress has not otherwise legislated with respect to the Northern Marianas Territorial Income Tax.

Use of the term "possessions" in the Federal income tax laws:
The terms "possession" or "possessions" appear frequently in Chapter 1 of the Internal Revenue Code, but rather surprisingly, the terms are nowhere given a general definition, either for purposes of Chapter 1 or for purposes of the Internal Revenue Code generally. As will appear below, the term "possession" is sometimes defined for particular purposes to include particular areas, but it is not defined generally. The closest one comes is to the definition of Puerto Rico as a "possession" (when not otherwise expressed or "manifestly incompatible" at 26 U.S.C. 7701(d)). But there can be no doubt that when the term "possessions" is used in the Federal income tax laws, and is not expressly defined in a more limited way for purposes of the section in question, it includes the Virgin Islands, Guam, American Samoa, and the Northern Marianas. Not only are they all from time to time defined as such for purposes of particular provisions, but they are all the subjects of at least some of the sections of the Internal Revenue Code at 26 U.S.C. 7651-7654, and those sections appear under the title "Possessions." (Those four sections constitute Subchapter D (entitled "Possessions") of Chapter 78 ("Discovery of Liability and Enforcement of Title") of Subtitle F ("Procedure and Administration") of the Internal Revenue Code. Accordingly, when the terms "possession" or "possessions" are used in the Internal Revenue Code and are not particularly defined in a more limited way, those words include the Virgin Islands, Guam, Samoa, and the Northern Marianas.

The Internal Revenue Code contains the United States income tax laws--not the territorial income tax laws that arise from other statutes, discussed above. So, references to "possessions" in the Internal Revenue Code refer to the manner in which the possessions are treated for Federal income tax purposes. The references are not there because of the four territorial income tax laws. For example, in the following instances, which are a few among many instances in which the Internal Revenue Code make reference to "possessions" without expressly defining the term, the term appears for purposes of the Federal (and not for purposes of any territorial) income tax law:

26 U.S.C. 27(a), permitting a credit against the Federal tax for taxes imposed by "possessions;"

26 U.S.C. 42(h)(7), defining "State" to include a possession for purposes of a low-income housing credit;

26 U.S.C. 48(k)(6) and (s)(8), which define the "United States" to include the possessions of the United States in connection with credits allowed in relation to movie and television films and sound recordings, respectively;

26 U.S.C. 115(2), excluding from gross income "income accruing to the government of any possession of the United States;" and

26 U.S.C. 164(b)(2), which defines a "State tax" as including a tax imposed by a possession, for purposes of the itemized deduction pertaining to taxes.

These examples will suffice to show the use of the term "possession" or "possessions," undefined, in various tax contexts--all for purposes of the Federal income tax.

But other sections name particular possessions--sometimes all those that are the subjects of this study, sometimes fewer--but again, they do so for purposes of the Federal tax; and the apparently uneven treatment results from the differences among the territorial income taxes as described above:

26 U.S.C. 876(a) excludes bona fide residents of Guam, American Samoa, and

the Northern Marianas from the 30% tax on certain income of nonresident aliens;

26 U.S.C. 881(b) excepts certain corporations organized in the Virgin Islands, Guam, Samoa, and the Northern Marianas from specified taxes on foreign corporations (but the title of the subsection has not caught up with the 1986 amendment that added Samoa and the Northern Marianas);

26 U.S.C. 897(c) includes real property interests "in the United States or the Virgin Islands" (alone among the territories) for purposes of the tax treatment of real property disposals in the "United States" by a nonresident alien or foreign corporation;

26 U.S.C. 927(d)(5) defines the "possessions" to mean the Virgin Islands, Guam, Samoa, and the Northern Marianas for purposes of favorable tax treatment of foreign sales corporations;

26 U.S.C. 931 provides a special definition of "gross income" for bona fide residents of each "specified possession," defined to mean Guam, Samoa, and the Northern Marianas;

26 U.S.C. 932 provides special rules for U.S. residents with Virgin Islands income and for bona fide Virgin Islands residents, and section 934 imposes limitations on the Virgin Islands tax exemption and subsidy program;

26 U.S.C. 936 provides a "possession tax credit" for domestic corporations with respect to income related to a possession, if certain conditions are met, with "possession" defined to "include" the Virgin Islands (26 U.S.C. 936(d)(1))--an unusual provision which results from the Virgin Islands' express exclusion from this beneficial provision before 1986; and

26 U.S.C. 957, which provides favorable tax treatment to bona fide residents of Guam, Samoa, and the Northern Marianas as shareholders in a controlled foreign corporation.

All of the foregoing sections guide the administration of the Federal income tax laws, but the existence of the particular territorial income tax systems makes them necessary or desirable; and the varying references to the "possessions," as including some or all of the territories, result from the differences in the territorial income tax laws. Guam and the Northern Marianas receive the same treatment, as the Covenant requires; Samoa (which was mentioned by name in the income tax provisions of the Internal Revenue Code for the first time in 1986) receives similar treatment; but the Virgin Islands, owing to such factors as its single filing procedure, and its continued "mirror" system, is for many purposes differently treated.

Before moving to a new subject, it might be noted in passing that the income tax laws recognize both the Trust Territory of the Pacific Islands (at this writing, consisting only of Palau) and the Ryukyu Islands (restored to Japanese sovereignty in part in 1953 and in remaining part in 1972). At 26 U.S.C. 274, certain entertainment expenses are not deductible unless associated with a "convention, seminar, or similar meeting" held in the "North American area," defined at section 274(h)(3)(A) to include the possessions and the Trust Territory. And, under 26 U.S.C. 872(b)(4), income from U.S. savings bonds is exempt from taxation if received by a

nonresident alien who acquired his bonds "while a resident" of the Ryukyus or the Trust Territory. Because the treatment of offshore areas is generally relevant to this study, the matter is mentioned, but it constitutes as well a tribute to the scrupulosity with which the Federal tax laws are constructed.

Provisions of the Internal Revenue Code of special interest to the territories: The Federal income tax laws, that is, the United States income tax as such, contain numerous provisions that give special recognition to the territories and that have the effect of conferring special benefits upon them. Three should be mentioned here, because the territories regard them as important and have worked to preserve them.

Under 26 U.S.C. 881 a foreign corporation (a term that generally includes, for purposes of the U.S. income tax, a corporation organized in a territory) is subject to a tax of 30% on certain income received from sources within the United States, but corporations organized in or under the laws of the Virgin Islands, Guam, Samoa, or the Northern Marianas (all of which are expressly named) are not treated as foreign corporations, if they meet certain tests (26 U.S.C. 881(b)). The tests all relate to close connections with the territory in question.

The Internal Revenue Code provides at 26 U.S.C. 921 certain tax benefits for the foreign trade income of foreign sales corporations--generally the subsidiaries of domestic corporations. Such foreign sales corporations may be organized under the laws of the Virgin Islands, Guam, Samoa, or the Northern Marianas (as well as under the laws of a foreign country (26 U.S.C. 922(a)(1)(A))). Following enactment of this 1984 law, all of the territories vigorously sought to have foreign sales corporations organize and maintain offices in their respective areas--but it does not appear now that they represent the panacea anticipated. The Virgin Islands, however, appear satisfied with the results achieved there.

Finally, the "possession tax credit" at 26 U.S.C. 936 is regarded as of major significance to the territories, who feared its possible loss in connection with the 1986 tax

legislation. The section was retained, however, and expanded to include the Virgin Islands as well (26 U.S.C. 936(d)(1)). The effect of the section is to relieve qualified U.S. domestic corporations (that is, corporations organized under the laws of the United States, a State, or the District of Columbia), from any Federal tax on income from a trade or business carried on in the Virgin Islands, Guam, Samoa, or the Northern Marianas, or income from certain investments within the territory where the trade or business is conducted. In order to qualify for this special credit, the domestic corporation must derive at least 80% of its gross income for a 3-year period preceding the tax year from sources within the territory, and 75% of its gross income must be derived from the active conduct of its trade or business in the territory.

De-linkage: The application to the territories of the Federal income tax laws as a local income tax has given rise to years of complaints, particularly from Guam and the Northern Marianas. The paramount initial motive of the Congress--of giving the territory assured income, in due course enough to eliminate the need for additional Federal subsidies--has never been satisfied, for each has continued to require additional Federal fiscal support. It has been thought advantageous, too, to present each territory with a ready-made tax code, with administrative and judicial constructions in abundance so that almost every question that might arise would already have been answered. And there has seemed to be some fundamental fairness involved in having the people of the territories subject to the same income tax laws and rates as apply to all others in the United States.

But, except in the Virgin Islands (where, as stated above, official and other sentiment now favors the continuation of the mirror system), stronger contrary sentiments have developed. The Federal tax laws have proved more complex than is congenial to territorial administrators, and the inability of territorial governments (in Guam and the Northern Marianas) to modify the income tax laws to meet perceived territorial needs has become a frustration. Certainly the fact that the territorial income tax is imposed from outside the territory is incompatible with local self-government and territorial autonomy. And, from the standpoint of the United States, the

mirror-systems have created areas of tax avoidance and tax evasion.

In this state of affairs, the Tax Reform Act of 1986 provides that Guam and the Northern Marianas may "de-link" from the Federal income tax laws--that is, they may enact their own income tax laws, to apply in lieu of the mirror system (section 1271, note following 26 U.S.C. 931). Such local income tax laws would apply to income received by a territorial resident, or derived from sources within the territory and effectively connected with trade or business in the territory. (Income from outside the territory received by territorial residents would continue to be taxed by the United States at U.S. rates, with the proceeds covered over to the territorial treasuries, as at present.)

In order to de-link, Guam and the Northern Marianas would be required to enter into an implementing agreement with the United States to eliminate problems of double taxation by the territory and the U.S., to establish rules to foreclose tax evasion or tax avoidance as to the U.S. income tax, to resolve other problems of tax administration, and to provide for the exchange of information between territorial and Federal tax authorities. Additionally, the territorial income tax law must be revenue neutral for five years, that is, the total amount of revenue raised by the territorial tax must be no less than the amount raised for the last fiscal year before the de-linked territorial law went into effect.

The "de-linkage" provision of section 1271 of the 1986 Tax Reform Act applies to Samoa as well. That is, Samoa too is authorized to enact its own tax laws by that section, subject to an implementing agreement of the sort just described. Properly speaking, Samoa has never been "linked" to the Federally-imposed mirror system that applies in the Virgin Islands, Guam, and the Northern Marianas, since its tax laws were locally enacted. The effect of section 1271 as to Samoa, however, has been to require that Samoa enter into an implementing agreement pursuant to section 1277(b) of the Tax Reform Act, in order to make effective a new rule--provided for in section 1276 (26 U.S.C. 7654(d))--by which Samoa would

receive the cover-over of income taxes paid by Federal employees stationed in Samoa.

In early 1989 Guam signed an implementing agreement with the United States, such agreement to become effective on January 1, 1991, but, as earlier noted, the effectiveness of that agreement was in December 1990 effectively postponed to an unspecified later date. The Northern Marianas Island has not yet sought to enter an implementing agreement.

In sum, the Virgin Islands remains a mirror-system jurisdiction and, under existing law, will continue to have that status. Guam has authority to adopt its own income tax law effective when its implementing agreement comes into force, but Guam has not yet enacted such income tax law and in the meantime, remains a mirror-system jurisdiction. Samoa has authority also to adopt its own, new income tax law, subject to its implementing agreement with the United States, but only if its new law is revenue neutral. Samoa has given no indication that it will enact a new income tax law in lieu of its current incorporation-by-reference of the Federal income tax law. The Northern Marianas has authority to enact its own income tax laws, subject to an implementing agreement, but has taken no steps toward doing so. There is some sentiment in the Northern Marianas that the provisions of the 1986 Tax Reform Act are inconsistent with the Covenant--a view not generally shared at the Federal level.

(b) Tax on Self-Employment Income (26 U.S.C. 1401-1403)

Chapter 2 of Title 26 imposes self-employment taxes. This tax upon self-employed individuals is parallel to the tax imposed on employers and employees under the Federal Insurance Contributions Act (26 U.S.C. 3101-3127, discussed in Memorandum No. 26-3(a)), and it is imposed for the same purpose: to support the Federal program of Old-Age, Survivors, and Disability Insurance, commonly known as Social Security, and the Federal program of hospital insurance, commonly known as Medicare. Cross references at 26 U.S.C. 1402(d) to pertinent definitions in the Federal Insurance

Contributions Act at 26 U.S.C. 3121 have the effect of making the tax on self-employment income applicable to self-employed individuals in the Virgin Islands, Guam, and Samoa. Section 606(b) of the Northern Marianas Covenant, which refers expressly to "laws of the United States which impose . . . self-employment taxes," makes clear that it applies in the Northern Marianas.

The cover-over provisions of the Organic Acts and other laws--which provide in the usual case for the payment into the territorial treasuries of taxes imposed "by the Congress on the inhabitants" of the territories--do not apply to the Chapter 2 tax on self-employment income. Chapter 2 taxes are expressly exempt from the cover-over in the Virgin Islands by its Organic Act (48 U.S.C. 1642), plus a clarifying provision of the Internal Revenue Code (26 U.S.C. 7651(5)(A)); in Guam, by its Organic Act (26 U.S.C. 1421h); and in the Northern Marianas, by section 703(b) of the Covenant. There is no Federal law providing for a general cover-over for Samoa (because the cover-over at 26 U.S.C. 7654(a) for the "specified possessions" of the Virgin Islands, Guam, Samoa, and the Northern Marianas applies only to Chapter 1 income taxes), so as to Samoa, the general rule that Federal tax collections are deposited in the Federal treasury (restated for the territories at 26 U.S.C. 7651(2)(A) applies.

(c) Withholding of Tax on Nonresident Aliens and Foreign Corporations (26 U.S.C. 1441-1464)

Chapter 3 imposes in general a 30% withholding tax on the gross income from U.S. sources of nonresident aliens (26 U.S.C. 1441(a)), and the same withholding on U.S. source income of foreign corporations (26 U.S.C. 1442(a)). For this purpose, a "foreign corporation" does not include a corporation organized under the laws of the Virgin Islands, Guam, Samoa, or the Northern Marianas, if certain standards are met (26 U.S.C. 1442(c)). Chapter 3 is intended, of course, to affect the U.S. income tax, administered by the U.S.

The provisions of Chapter 3 apply in the territories, however, as part of the mirror system (but of course in reverse). That Chapter 3 constitutes a part of the territorial income tax laws in all four of them is made clear by the provision at 26 U.S.C. 1444, which provides particular rules applicable to the Virgin Islands territorial income tax. (The words there used are "tax liability incurred in the Virgin Islands pursuant to this title (as made applicable to the Virgin Islands).") Additionally, Chapter 3 is comprehended by the definition of "income-tax laws" appearing in the Guam Organic Act (48 U.S.C. 1421i(d)), which includes all of Subtitle A of Title 26, except for Chapter 2 on Self-Employment Taxes.

(d) Rules Applicable to Recovery of Excessive Profits on Government Contracts (26 U.S.C. 1481-1482)

These sections (Chapter 4) permit the adjustment of tax liability, in the event that the taxpayer has been required to pay excess profits to the United States on a Federal contract, or has experienced price redetermination under certain subcontracts. These sections too are part of the "income tax laws" of each of the territories, but they are largely academic at this time.

(e) Tax on Transfers to Avoid Income Tax (26 U.S.C. 1491-1494)

These sections (Chapter 5) impose an excise tax on transfers of property by a citizen, resident, or domestic corporation to certain foreign transferees, if the transfer is at less than fair market value. These sections also are part of the income tax laws of the territories.

(f) Consolidated Returns (26 U.S.C. 1501-1564)

Chapter 6 provides for consolidated income tax returns for an "affiliated group of corporations," and related matters. Again, these sections are part of the income tax laws of each of the territories.

Memorandum No. 26-1

Federal agency comments: Comments on this memorandum were requested from the Department of Justice and the Internal Revenue Service. All comments received have been reflected above.

Subject: Estate and Gift Taxes
Title 26, Subtitle B, 26 U.S.C. 2001-2663

Comment: Federal estate and gift taxes do not, in general, apply to U.S. citizens in the territories if they are "natives" of the territories, nor do they apply to their children who are born in those areas and resident there. Such taxes do apply, however, to U.S. citizens who move from the "United States" (defined to include the States and the District of Columbia) to the territories, in the same manner as they would apply to them had they remained in the "United States."

Discussion: The taxes in general. The Federal estate tax is imposed upon property transferred at death, the gift tax upon transfers made during the life of the donor. They are separate taxes, but since 1977 they have been integrated and made subject to the same rate schedule, thereby eliminating the advantage that earlier attached to lifetime gifts, which had been subject to a lesser tax rate. At this time all gifts made during the life of the decedent (but after June 1932) are included within the decedent's gross estate, with a credit allowed for gift taxes earlier paid. Gift taxes, thus, represent a kind of downpayment on the estate tax later due.

Substantial exemptions and credits are allowed under each of these taxes, so they in fact apply to a relatively small portion of the U.S. population. For example, under current provisions the estate tax law contains a credit against the tax due of \$192,800--which has the effect of exempting an estate of \$600,000 or less (26 U.S.C. 2010(a), 2001(c)). Gifts are exempt from the gift tax if they involve no more than \$10,000 in any one year to any one person (26 U.S.C. 2503(b)). Other credits and exemptions are also provided for.

Application in the Virgin Islands, Guam, and the Northern Marianas. Unlike the Federal income tax, which is expressly made applicable in the Virgin Islands, Guam, and the Northern Marianas by particular Federal laws enacted for each of them (such as the Guam Organic Act and the Northern Marianas Covenant), no such particular Federal law deals expressly with the Federal estate and gift taxes. The Federal estate tax

(and, in effect, the gift tax) applies to "the transfer of the taxable estate of every decedent who is a citizen or resident of the United States" (26 U.S.C. 2001(a)). The term "United States" includes "only the States and the District of Columbia" (26 U.S.C. 7701(a)(9)), but that definition does not wholly exempt the territories from these taxes. United States citizens in the Virgin Islands, Guam, and the Northern Marianas are dealt with at 26 U.S.C. 2208 and 2209. Section 2208 states which residents of "possessions" are to be considered U.S. citizens for estate tax purposes:

A decedent who was a citizen of the United States and a resident of a possession thereof at the time of his death shall, for purposes of the tax imposed by this chapter, be considered a "citizen" of the United States within the meaning of that term wherever used in this title unless he acquired his United States citizenship solely by reason of (1) his being a citizen of such possession of the United States, or (2) his birth or residence within such possession of the United States.

In other words, and in territorial parlance, those residing in the territories who are commonly referred to as "Statesiders" or "continentals" are U.S. citizens for estate tax purposes, and thus subject to the estate tax.

Section 2209 defines which residents of "possessions" are to be considered "nonresidents not citizens of the United States," and thus not subject--in general--to the estate tax.

A decedent who was a citizen of the United States and a resident of a possession thereof at the time of his death shall, for purposes of the tax imposed by this chapter, be considered a "nonresident not a citizen of the United States" within the meaning of that term wherever used in this title, but only if such person acquired his United States citizenship solely by reason of (1) his being a citizen of

such possession of the United States, or (2) his birth or residence within such possession of the United States.

In other words, and in territorial parlance, those commonly referred to as "natives" of the territory are not U.S. citizens for estate tax purposes, and thus not in general subject to the estate tax.

Provisions parallel to 26 U.S.C. 2208 and 2209 appear for purposes of the gift tax at 26 U.S.C. 2501(b) and (c), respectively.

More particularly, the people of the Virgin Islands, Guam, and the Northern Marianas acquired United States citizenship "solely" by reason of either (1) or (2) above quoted from 26 U.S.C. 2209: In general, the people of the Virgin Islands acquired citizenship in 1927 either as a result of residence there or birth there between 1917 and 1927, or later (8 U.S.C. 1406); the people of Guam acquired citizenship in 1950 as a result of residence, or birth there (8 U.S.C. 1407); and the people of the Northern Marianas acquired citizenship in 1986 as a result of domicile or birth there (Northern Marianas Covenant, Article III). (See Memorandum No. 8-1.) The foregoing territorial people, therefore, are "nonresidents not citizens of the United States" for estate tax purposes. Their children, born in the territory and residing there at the time of death, have the same status (26 CFR 20.2209-1, Example (2)).

(It will be noted that the foregoing discussion is offered "in general." Variations and refinements under both the naturalization laws and the tax laws are almost infinite, so that there are many departures from these very general propositions.)

Application in American Samoa. The status of American Samoans under the estate and gift tax laws is not dealt with expressly by statute, and so far as can be established, appears not to have been dealt with elsewhere. The bulk of American Samoans

in Samoa are noncitizen nationals of the United States, and as such they would not usually be subject to the estate or gift tax. That is, they are not citizens of the United States, nor are they residents of the "United States" as that term is defined in the Internal Revenue Code (26 U.S.C. 7710(a)(9)). Although they are residents of a "possession," they cannot be "nonresidents not citizens of the United States" for purposes of 26 U.S.C. 2209 because they are not U.S. citizens. It follows that the estate and gift tax laws do not touch noncitizen nationals in American Samoa, except with respect to any property they might have that is situated in the United States--a matter discussed below.

As to those native Samoans who are residents of Samoa and who have acquired U.S. citizenship, they would probably in the usual case be treated for estate and gift tax purposes in the same manner as "statesiders" or "continentals," as described above. Their U.S. citizenship would have been acquired under general provisions of the U.S. nationality laws--most commonly as a result of service in the U.S. armed forces--and not as a result of either citizenship in American Samoa or birth or residence there. Such persons would, thus, be "citizens" of the U.S. under 26 U.S.C. 2008, and not "nonresidents not citizens" under 26 U.S.C. 2009. (That is, again, a "general" proposition from which departures are possible in particular cases. A child born in Samoa of U.S. citizen parents and residing there at death might well qualify as a "nonresident not a citizen of the United States" under 26 U.S.C. 2209, 26 CFR 20.2209-1, Example (2). But the refined application of these tax laws to particular cases is not the function of this memorandum.)

Finally, "statesiders" in Samoa--that is, U.S. citizens who moved to Samoa and were residing there at the time of death--would be subject to the estate and gift tax laws, in the same manner as if they'd chosen the Virgin Islands (or another territory) instead. That conclusion is based on the premise that Samoa is a "possession" for purposes of 26 U.S.C. 2008.

The meaning of "possession." It is worth noting that the term "possession" is not defined generally for purposes of the

Internal Revenue Code. It is defined from time to time for purposes of particular sections, and those definitions vary (see, for example, 26 U.S.C. 931(c) and 936(d)(1)). When the term is undefined, however, as in 26 U.S.C. 2208 and 2209, it is reasonable to assume that it includes at least the Virgin Islands, Guam, Samoa, and the Northern Marianas. They are all dealt with in Subchapter D (26 U.S.C. 7651-7655, entitled "Possessions") of Chapter 78 ("Discovery of Liability and Enforcement of Title") of Subtitle F ("Procedure and Administration") of the Internal Revenue Code. Additionally, under section 601(c) of the Northern Marianas Covenant, "References in the Internal Revenue Code to Guam will be deemed also to refer to the Northern Mariana Islands. . ."

Taxes on nonresidents not citizens. Territorial natives who are U.S. citizens, and who are thus defined as nonresidents not citizens of the United States, by 26 U.S.C. 2209, are not entirely free from taxation under the estate and gift tax laws. The estate tax is imposed on the taxable estate "of every decedent nonresident not a citizen of the United States" (26 U.S.C. 2101(a)), but it applies only to that part of the estate that "is situated in the United States" (26 U.S.C. 2103). Similarly, the gift tax applies, in the case of a nonresident not a citizen of the United States, only to property "situated within the United States" (26 U.S.C. 2511(a)). For purposes of these provisions, the "United States" would have the meaning accorded it by 26 U.S.C. 7701(a)(9), which means that citizens who are territorial natives are subject to the tax only to the extent that Stateside property is involved. The same would be true of noncitizen nationals in American Samoa. They are, literally, nonresidents who are not citizens of the United States, even though not so defined by 26 U.S.C. 2209.

A particular estate tax credit is afforded, however, under 26 U.S.C. 2102(c)(2) to a "nonresident not a citizen of the United States" who is so defined by 26 U.S.C. 2009. The credit is potentially larger for such persons than it is for nonresident noncitizens not so defined. Accordingly, territorial natives (i.e., nonresident noncitizens as so defined in 26 U.S.C. 2009) in the Virgin Islands, Guam, and the Northern Marianas have an advantage over natives of American Samoa.

Generation-Skipping Transfers. The instant Subtitle of the Internal Revenue Code (Subtitle B) contains not only the Estate Tax and Gift Tax, but also the tax on generation-skipping transfers (26 U.S.C. 2601-2663). It is directed at trust and other arrangements that could result in tax avoidance, and it is peculiarly arcane, even for the Federal tax laws. It is, however, in effect supplementary to the estate and gift taxes (26 U.S.C. 2641(a), 2642(b) and (c)), and it may be sufficient here to state only that its application does not differ from that of those taxes.

Cover-over. Federal law provides that the proceeds of taxes levied "by the Congress on the inhabitants" of the Virgin Islands, Guam, and the Northern Marianas will be covered over, or paid into, the respective territorial treasuries (48 U.S.C. 1642, Virgin Islands; 48 U.S.C. 1421h, Guam; and section 703(b) of the Northern Marianas Covenant). Accordingly, estate and gift taxes collected under the Federal tax laws from "inhabitants" of these three areas are not retained by the United States but are instead required to be paid into the local treasuries. There is no parallel law in the case of Samoa (whose cover-over is confined by 26 U.S.C. 7654 to the "normal" income tax), so Federal estate or gift taxes derived from inhabitants of Samoa would be retained by the United States.

Federal agency comments: Comments on this memorandum were requested from the Department of Justice and the Internal Revenue Service. All comments received have been reflected above.

Subject: Employment Taxes
(Title 26, Subtitle C, 26 U.S.C. 3101-3509)

Comment: Of the three employment taxes imposed by this Subtitle C, only one--the Federal Insurance Contributions Act--applies to all four of the territories here involved. One other--the Federal Unemployment Tax Act--applies to the Virgin Islands, alone among the territories.

Discussion: (a) The Federal Insurance Contributions Act (Chapter 21, 26 U.S.C. 3101-3127) imposes wage-based taxes on employers and employees to support the Federal program of Old-Age, Survivors, and Disability Insurance, commonly known as Social Security, and the Federal program of hospital insurance, commonly known as Medicare. The tax is collected with respect to wages paid for "employment," with that term defined to mean, among other things, service performed by an employee "within the United States" (26 U.S.C. 3121(b)). The "United States," in turn, includes the Virgin Islands, Guam, and Samoa, as does the term "State" (26 U.S.C. 3121(e)). (Parallel definitions in the pertinent part of the Social Security Act result in the application of that insurance program to the three areas. See Memorandum No. 42-2.)

As a consequence of the foregoing, the Federal Insurance Contributions Act applies by its own terms to the Virgin Islands, Guam, and Samoa, and "Social Security taxes" (i.e., taxes imposed by the Federal Insurance Contributions Act) are therefore collected in those territories in the same manner as in the States. The Act applies as well to the Northern Marianas, and the taxes are collected there, but this is a result of the Northern Marianas Covenant and not of the Act itself. Section 606(b) of the Covenant provides that

Those laws of the United States which impose excise and self-employment taxes to support or which provide benefits from the United States Social Security System will upon termination of the Trusteeship Agreement or such earlier date as may be agreed to . . .

become applicable to the Northern Mariana Islands as they apply to Guam.

The Federal Insurance Contributions Act is, of course, such a law.

The Organic Acts and the Northern Marianas Covenant all provide that taxes levied "by the Congress on the inhabitants" of those areas will be covered over to the respective territorial treasuries, but in each case there is excepted from the cover-over the taxes imposed by the Federal Insurance Contributions Act (usually referred to as "Chapter 21 of Title 26, United States Code") (48 U.S.C. 1642 and 26 U.S.C. 7651(5)(A), Virgin Islands; 48 U.S.C. 1421h, Guam; and section 703(b) of the Northern Marianas Covenant). Hence, unlike most other Federal taxes collected in the territories, the proceeds of the Federal Insurance Contributions Act are paid to the Federal Treasury, not to territorial treasuries--which is appropriate, given their function of supporting the Social Security System, which is also applicable in those areas. There is no Federal law that provides for the cover-over of Federal taxes collected in American Samoa (other than income taxes under 26 U.S.C. 7654), so there is no need for a Federal law explicitly stating that taxes under the Federal Insurance Contributions Act collected in Samoa will be paid to the Federal Treasury.

A review of the provisions of the Act reveals two of interest to the territories. In general, employees of "State" governments are not covered by the Federal Insurance Contributions Act or by the Social Security System, although the system may be extended to them by voluntary agreements (42 U.S.C. 418). A special provision concerning officers and employees of the Governments of Guam and American Samoa, however, appears to require their inclusion in the System and to make them subject to the Federal Insurance Contributions Act (26 U.S.C. 3121(b)(7)(B)). Informal advice from the Internal Revenue Service indicates, however, that in the case of Guam, permanent employees of that Government are not under the Federal Social Security System but are instead covered by the Government of Guam's own retirement system (which in fact provides more generous benefits than the Federal system). The

only Government of Guam employees now covered by the Federal system, and subject to the Federal Insurance Contributions Act, are those "properly classified as . . . temporary or intermittent" who are not covered by the territorial retirement system (26 U.S.C. 3131(b)(7)(D)). In any event, the provisions pertaining to Guam in this tax law apply also to the Northern Marianas, in light of section 601(c) of the Northern Marianas Covenant:

References in the Internal Revenue Code to Guam will be deemed also to refer to the Northern Mariana Islands, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof or of this Covenant.

A second provision of particular interest has the effect of excluding from the Federal Insurance Contributions Act, and from the Social Security System, certain temporary workers in Guam. Excluded from covered employment by 26 U.S.C. 3321(b)(18) is

service performed in Guam by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)).

The Internal Revenue Service advises informally that the same exemption is now accorded by treaty to (H)(ii) workers in Guam from Korea. But all other (H)(ii) nonimmigrant workers in Guam--from places other than the Philippines and Korea--are covered by the Federal Insurance Contributions Act. These exemptions for temporary workers in Guam apply as well in the Northern Marianas, given the language quoted above from section 601(c) of the Covenant. This result has given rise to a problem, unresolved at this writing, because the Immigration and Nationality Act does not generally apply to the Northern Marianas (see Memorandum No. 8-1), so there are no "(H)(ii)" workers there, as such. The closest equivalent under Northern

Marianas law and practice are temporary workers who may remain many years, sometimes more than a decade. Whether they should be accorded a continuing exemption from the Social Security System and the attendant taxes is the currently unanswered question.

(b) The Railroad Retirement Tax Act (26 U.S.C. 3201-3233) imposes wage-based taxes with respect to employment of railroad and certain related transportation workers to support the Railroad Retirement System--a program somewhat similar to the Social Security System but directed to a particular category of employees. There are no railroads in any of the territories, and the "carriers" that are subject to the Railroad Retirement Tax Act (26 U.S.C. 3231(g)) i.e., those subject to Subchapter I of the Interstate Commerce Act, are for all practical purposes exempt if in the territories. There is room for a theoretical but very limited application of the pertinent portion of the Interstate Commerce Act to the territories, as explained in Memorandum No. 49-2, but none in reality, so the Railroad Retirement Tax Act may be viewed as being irrelevant to the territories.

(c) The Federal Unemployment Tax Act (26 U.S.C. 3301-3311) imposes a tax on employers, based on wages paid, and the proceeds are used to support the Federal-State unemployment compensation program under which unemployed workers may obtain weekly unemployment insurance benefits--generally for about 26 weeks--pursuant to State unemployment compensations laws. The Unemployment Tax Act applies to the Virgin Islands, as of 1976, but not to Guam, Samoa, or the Northern Marianas (26 U.S.C. 3306(c), (j)). The Tax Act has the same application as Title III of the Social Security Act, which it supports, and which constitutes the basis for the unemployment compensation program. (See Memorandum No. 29-2 and Memorandum No. 42-3.) Hence, neither Title III of the Social Security Act nor the Unemployment Tax Act applies in Guam, Samoa, or the Northern Marianas. Both apply in the Virgin Islands.

(d) The Railroad Unemployment Repayment Tax (26 U.S.C. 3321-3323) is irrelevant to the territories.

(e) The Collection of Income Tax at Source of Wages (26 U.S.C. 3401-3406) contains provisions for the employer's withholding from wages to be paid of specified amounts due from employees under the income tax laws. They also provide for withholding with respect to certain other payments, including pensions and annuities. As such, these provisions are a part of the income tax laws (although codified in the "Employment Taxes" Subtitle of the Internal Revenue Code), and they are applicable to the territories under the mirror theory, discussed in Memorandum No. 26-1.

(f) The General Provisions Relating to Employment Taxes (26 U.S.C. 3501-3509) appear to contain no matters of special interest to the territories.

Federal agency comments: Comments on this memorandum were requested from the Department of Justice and the Internal Revenue Service. All comments received have been reflected above.

Memorandum 26-4
January 1989
Revised January 1991

Subject: Miscellaneous Excise Taxes
(Title 26, Subtitle D, 26 U.S.C. 4001-5000)

Alcohol, Tobacco, and Certain Other Excise Taxes
(Title 26, Subtitle E, 26 U.S.C. 5001-5881)

Comment: Excise taxes imposed by Federal law are, for the most part, not applicable to the territories--but as shown below, in a few instances particular excise taxes have been made expressly applicable to them.

Discussion: For purposes of the Internal Revenue Code generally, the term "United States" includes only the States and the District of Columbia (26 U.S.C. 7701(a)(9)), and the term "State" has the same meaning (26 U.S.C. 7701(a)(10)). As a consequence, Federal excise taxes do not apply to the territories that are the subjects of this study--the Virgin Islands, Guam, American Samoa, and the Northern Marianas (which are usually termed "possessions" in the Internal Revenue Code)--unless particular language makes them applicable. It does so in connection with a few excise taxes. But in the absence of language extending the tax beyond the "United States," as defined in the Code, the tax does not apply in the territories.

In some instances the term "United States" is used in the particular excise tax law to make quite clear that the tax is not applicable or collected beyond the States and the District. An example is the tax on distilled spirits, which is imposed "on all distilled spirits produced in or imported into the United States" (26 U.S.C. 5001(a)(1)). Very often the statement of geographical application is less direct, but internal references make clear that the excise tax in question is confined to the States and the District of Columbia. An example is the excise tax on "the first retail sale" of heavy trucks and trailers, where a reference to retail sales taxes imposed by States or the District of Columbia (only) confirms that the tax is not collected in other jurisdictions (26 U.S.C. 4052(b)(1)(B)(ii)). On rare occasions there is, within the four corners of the tax provision itself, no hint of geographic application, but in those cases the general

definition of "United States" has the effect of making the tax inapplicable to the territories. The excise tax on certain firearms (26 U.S.C. 4181-4182), and on "large group health plans" (26 U.S.C. 5000), are examples. In addition, the excise tax laws, unlike the "income tax laws in force in the United States" which have been made applicable in the territories (see Memorandum No. 26-1), are not the subject of any general Federal law extending them to the territories. Therefore, without more, a Federal tax labeled an "excise tax" does not apply in or to the territories.

Excise taxes that fall into any of the foregoing categories are listed below and said to be "not applicable"--meaning that they are not imposed in or collected in the territories. Those that do apply within the territories are accompanied by a statement as to the reason for the conclusion, and in some cases a rationale is also supplied for the conclusion that the tax is "not applicable."

A provision of special importance to the territories in connection with Federal excise taxes appears not in these excise tax subtitles of the Internal Revenue Code, but instead in a later subtitle (relating to Procedure and Administration). Section 7653(b) of Title 26 provides that

Articles, goods, wares, or merchandise going into Puerto Rico, the Virgin Islands, Guam, and American Samoa from the United States shall be exempted from the payment of any tax imposed by the internal revenue laws of the United States.

That means that the excise taxes collected on, for example, tires sold in the United States, or on liquor produced in the United States, do not apply if the tires or the liquor are shipped to a territory. (Although the Northern Marianas are unnamed in the section, the section 7653(b) benefit applies there pursuant to section 601(c) of the Northern Marianas Covenant.)

There is no short-cut for establishing which of the Federal excise taxes apply in the territories, and it should be noted that the cross references supplied at 26 U.S.C. 7655 are, for such a purpose, incomplete. Those cross references appear in the portion of the Internal Revenue Code that is titled "Possessions" (26 U.S.C. 7651-7655), and they refer the reader to "provisions imposing tax in possessions." The cross references are obviously of value, but they ought not to be viewed as citing all provisions imposing taxes in the possessions (territories), because they do not do so.

Note: Informal comments on this memorandum have been sought from the Internal Revenue Service, but the IRS has been expressly urged to refrain from examining in depth each of the legal questions raised. Advice from the Internal Revenue Service can result in lengthy, careful, compelling opinions--as occurred when, during the course of this study, the IRS was asked informally whether the gasoline tax applies to the territories. The result was a multi-page, closely-reasoned opinion concurring in the initial conclusion that it did not. (See the discussion below at 26 U.S.C. 4081.) It would be presumptuous and otherwise inappropriate to seek that kind of advice from the IRS on the myriad legal conclusions contained in this memorandum.

Accordingly, although there has been informal IRS review and advice on what follows, the results below should not be viewed as expressing an official IRS opinion (except with respect to the gasoline tax).

26 U.S.C. 4001-4012 - luxury taxes:

Not applicable

The Revenue Reconciliation Act of 1990 imposed certain taxes on the first retail sale of particular luxury items: automobiles sold for a price exceeding \$30,000, boats in excess of \$100,000, aircraft in excess of \$250,000, jewelry in excess of \$10,000, and furs in excess of \$10,000. Because they are excise taxes, they do not apply to the territories unless there is an

express provision making them applicable, and no such provision has been made.

26 U.S.C. 4041-4042 - <u>tax on diesel fuel and on certain special fuels:</u>	Not applicable
26 U.S.C. 4051-4053 - <u>tax on heavy trucks and trailers:</u>	Not applicable
26 U.S.C. 4064 - <u>gas guzzler tax:</u>	Not applicable
26 U.S.C. 4071-4073 - <u>tax on tires:</u>	Not applicable
26 U.S.C. 4081-4083 - <u>gasoline tax:</u>	Not applicable

In an opinion dated May 31, 1988 (CC:INTL-200-88, Brl: WEWilliams), the Associate Chief Counsel (Technical and International) of the Office of Chief Counsel, Internal Revenue Service, concluded "that the gasoline excise tax imposed by I.R.C. sec. 4081 is not applicable in the possessions."

26 U.S.C. 4091-4093 - <u>tax on diesel fuel and aviation fuel:</u>	Not applicable
26 U.S.C. 4121 - <u>coal tax:</u>	Probably applicable

The coal tax is imposed "on coal from mines located in the United States sold by the producer," with the term "United States" defined as in 26 U.S.C. 638(1) (26 U.S.C. 4121(d)(3)). Section 638 defines continental shelf areas, and

in paragraph (1) defines the "United States" to include

. . . the seabed and subsoil of those submarine areas which are adjacent to the territorial waters of the United States and over which the United States has exclusive rights, in accordance with international law, with respect to the exploration and exploitation of natural resources . . .

That language would include submarine areas adjacent to the territories. But paragraph (2) of the same section 638 defines a "possession of the United States" in the same terms, i.e., to include the seabed and subsoil of those submarine areas that are adjacent to the territorial waters of "such possession," and over which "the United States in case of such possession" has exclusive rights in accordance with international law for exploration and exploitation. One therefore wonders whether the definition in (2)--of possessions--means that the possessions are excluded from (1). If so, the coal tax would not apply in the "possessions" (or territories). But perhaps (2) is merely redundant.

Since no coal is produced in any of the territories nor in their adjacent waters, the question does not require an answer.

26 U.S.C. 4131-4132 - tax on certain vaccines:

Applies

A tax is imposed on the sale by the manufacturer, producer, or importer in the "United States" of certain vaccines--all of which are known well to the mothers and infants of America. (They include the polio vaccine, the DPT vaccine

against diphtheria, pertussis, and tetanus, and the MMR vaccine against measles, mumps, and rubella.) The "United States" is defined (by a cross reference to 26 U.S.C. 4612(a)(4)), to include "any possession of the "United States" and "the Commonwealth of the Northern Mariana Islands." Accordingly the tax applies to manufacturers, producers, and importers of the specified vaccines in the Virgin Islands, Guam, Samoa, and the Northern Marianas. (But note 26 U.S.C. 7653(b), which provides a general exemption from Federal taxes of articles "going into" the Virgin Islands, Guam, and American Samoa, and, by operation of section 601(c) of the Covenant, the Northern Marianas. This general provision at 26 U.S.C. 7653(b) should be viewed as having been superseded in the case of the vaccine tax by the more specific, later-enacted provision at 26 U.S.C. 4132(a)(7), which contains the cross reference to 26 U.S.C. 4612(a)(4).)

- | | |
|--|-----------------------------|
| 26 U.S.C. 4161-4162 - <u>tax on sport fishing equipment and bows and arrows:</u> | Not applicable |
| 26 U.S.C. 4181-4182 - <u>tax on firearms:</u> | Not applicable |
| 26 U.S.C. 4251-4254 - <u>tax on communication services:</u> | Not applicable |
| 26 U.S.C. 4261-4263 - <u>tax on air transportation of persons:</u> | L a r g e l y
applicable |

The transportation tax applies generally only to air transportation that begins and ends in the "United States," a term not specially defined, so for this purpose it means the States and the District of Columbia only. Hence, travel between

St. Thomas and St. Croix, for example, or between Guam and Saipan, is tax free. But travel between a territory and the States may be partly subject to tax, for such segment of the transportation as is taxable, and travel from the "United States" to a territory (or foreign country) is subject to a special tax (26 U.S.C. 4261(c)).

26 U.S.C. 4271-4272 - tax on air transportation of property:

L a r g e l y
applicable

As in the case of the tax on air transportation of persons, this tax applies to transportation that "begins and ends in the United States" (26 U.S.C. 4272(a)), i.e., in the States or the District of Columbia. But transportation of property between a territory and the "United States" would be taxable with respect to whatever segment is in the "United States."

26 U.S.C. 4293 - exemption:

Although the title of this section is "Exemption for United States and possessions," the text confines the exemption authority to the United States Government alone.

26 U.S.C. 4371-4374 - tax on policies issued by foreign insurers:

Not applicable

The tax is imposed on policies written by foreign insurers against risks in "the United States." But an insurance company in a territory, if it were to write policies against risks in the States or the District of Columbia, would be

"foreign" for this purpose and thus the policies would be subject to the tax.

26 U.S.C. 4401-4424 - tax on wagering: Not applicable

A statement of "Territorial extent" at 26 U.S.C. 4404 makes clear that the tax on wagers applies only within the "United States," i.e., the States and the District of Columbia. The occupational tax on those associated with wagering (26 U.S.C. 4411) is similarly confined.

26 U.S.C. 4461-4462 - harbor maintenance tax: Not applicable

This tax is imposed on the use of a port "in the United States" for the loading or unloading of commercial cargo, measured by the value of the cargo involved. Not only are ports in the territories outside the "United States," but cargos moving between the U.S. mainland and the territories are subject to a special exemption (26 U.S.C. 4462(b)).

26 U.S.C. 4481-4484 - tax on use of heavy trucks: Not applicable

26 U.S.C. 4495-4498 - tax on removal of hard mineral resources from deep seabed: Applies

The tax is imposed on the holder of a "deep seabed permit" with respect to any removal of a hard mineral resource from the deep seabed. Such permit holder is one who has been issued a permit under Title I of the Deep Seabed Hard Minerals Resources Act (30 U.S.C. 1411-1428), an act that

applies to the territories. (See Memorandum No. 30-3, where the broad definition of "United States" at 30 U.S.C. 1403(13) is discussed, and where it is pointed out that the application of the Act to "citizens" only should be corrected to include noncitizen nationals in Samoa, if seabed mining ever becomes a reality there.)

26 U.S.C. 4501-4503 - tax on sugar: Not applicable

The sugar tax has terminated (26 U.S.C. 4501(b)), but when in effect it applied not only to the States and the District of Columbia, but also to Puerto Rico (26 U.S.C. 4502(5)).

26 U.S.C. 4611-4612 - tax on petroleum: Applies

The petroleum tax is imposed on crude oil "received at a United States refinery," and on petroleum products "entered into the United States" for consumption. The term "United States" includes "any possession of the United States," and expressly "the Commonwealth of the Northern Mariana Islands" (26 U.S.C. 4612(a)(4)(A)). It thus applies to crude oil refined in any of the territories, and to petroleum products imported there.

Under 26 U.S.C. 4612(e), the provision of the Internal Revenue Code at 26 U.S.C. 7652(b)(3), which pertains to the disposition of tax revenues on products of the Virgin Islands that are transported to the United States, does not apply to the petroleum tax. (A similar provision as to Puerto Rico effects the same result.) Section 7652(b)(3), which is derived from section 28 of the 1954 Virgin Islands Organic Act, provides that "all taxes imposed by . . . the internal revenue laws of the United States on articles produced in the Virgin Islands and transported to the United

States" shall (with exceptions and under conditions not now pertinent) be paid over to the Government of the Virgin Islands. Given the provision of 26 U.S.C. 4612(e), enacted in 1986, the petroleum tax levied on oil refined in the Virgin Islands is not paid over to the Government of the Virgin Islands, but is instead retained by the Federal Treasury. That provision is consistent with Virgin Islands v. Blumethal, 642 F.2d, 641 (1980), cert. denied, 451 U.S. 983 (1980).

Both Guam and the Northern Marianas are the beneficiaries of provisions similar to the Virgin Islands' section 7652(b)(3) and its related Organic Act section at 48 U.S.C. 1642--Guam's at 48 U.S.C. 1421h, and the Northern Marianas' at section 703(b) of the Covenant. Since 26 U.S.C. 4612(e) refers to the Virgin Islands (and Puerto Rico) only, it appears that petroleum taxes levied in Guam and the Northern Marianas, or on shipments from them to the States, would be subject to transfer to the treasuries of those governments.

26 U.S.C. 4661-4662 - tax on certain chemicals:

Applies

The tax on certain chemicals (listed at 26 U.S.C. 4661(b)) applies to such substances "manufactured or produced in the United States or entered into the United States" for consumption or use (26 U.S.C. 4662(a)(1)(B)). Again the "United States" is defined as in 26 U.S.C. 4612(a)(4), so that "possessions" and "the Commonwealth of the Northern Mariana Islands" are included. The tax, thus, applies to such chemicals manufactured in the territories or imported there.

As in the case of the petroleum tax discussed immediately above, these taxes also are not paid over to the Virgin Islands Government (26 U.S.C. 4662(f)). But in the absence of similar

provisions with respect to Guam and the Northern Marianas, any such taxes collected with respect to them would be subject to being paid over to those governments under 48 U.S.C. 1421h and section 703(b) of the Northern Marianas Covenant.

26 U.S.C. 4671-4672 - tax on certain
imported
substances:

Applies

The tax is imposed on certain imported substances (which are chemicals, 26 U.S.C. 4672(a)(3)) imported into the "United States," with that term defined (at 26 U.S.C. 4672(b)(2) by a cross reference to 4662(a), which in turn contains a cross reference to 4612(a)(4)) to include the "possessions" and "the Commonwealth of the Northern Mariana Islands." The tax thus applies to such substances when they are imported into the territories.

As in the case of the two taxes discussed immediately above, taxes collected on imports of such substances into the Virgin Islands are not paid over to the Virgin Islands Government (26 U.S.C. 4672(c)). But in the absence of similar provisions with respect to Guam and the Northern Marianas, any such taxes collected there would be subject to being paid over to those governments under 48 U.S.C. 1421h and section 703(b) of the Northern Marianas Covenant.

26 U.S.C. 4701 - tax on registration-
required obligations:

Not applicable

This tax is imposed upon the issuer of registration-required obligations that are not in registered form. Although internal references indicate that it is related to the income tax laws (such references being to 26 U.S.C. 163(f) and

149(a)), the tax is part of the Federal excise tax laws and not of the "income tax laws" of the United States in force in the territories, and it consequently does not apply in the territories.

26 U.S.C. 4911-4912 - tax on public charities:

Not applicable

This tax is imposed on certain excess lobbying expenditures of an organization that qualifies for certain tax exemptions under section 501(c)(3) of the Internal Revenue Code. That section, being part of the income tax laws of the United States, applies in the territories, but the excise tax on excess lobbying expenses would not apply because it is an excise tax, and not part of the income tax laws.

26 U.S.C. 4940-4963 - tax on private foundations and certain other tax-exempt organizations:

L a r g e l y
inapplicable

These sections impose various excise taxes on tax exempt private foundations, black lung benefit trusts, and 501(c)(3) organizations. These excise taxes would not apply in the territories, but it should be noted that under 26 U.S.C. 4948(a) "every foreign organization which is a private foundation" is subject to a tax on investment income "derived from sources within the United States." Private foundations in the territories, being "foreign" under the Internal Revenue Code, would be subject to this tax on income derived from the States and the District of Columbia.

26 U.S.C. 4971-4981A - taxes on pension plans:

Not applicable

These sections impose various excise taxes on pension and other plans that qualify for special treatment under the income tax laws. Because they are excise taxes, and not part of the Federal income tax laws, they do not apply in the territories.

26 U.S.C. 4981-4982 - taxes on investment entities: Not applicable

These sections impose excise taxes on real estate investment trusts and on regulated investment companies. Because they are "excise taxes," they do not apply in the territories.

26 U.S.C. 4999 - tax on golden parachute payments: Not applicable

This tax is imposed on certain golden parachute payments, and because it is an excise tax, it would not apply in the territories.

26 U.S.C. 5000 - tax on certain large group health plans: Not applicable

26 U.S.C. 5001-5691 - taxes relating to distilled spirits, wines, and beer: Not applicable

Gallonage taxes are imposed on distilled spirits wine, and beer that is either produced in or imported into the "United States" (26 U.S.C. 5001(a)(1), 5041(a), 5051(a)(1)), and because the "United States" means only the States and the District of Columbia (26 U.S.C. 7701(a)(9)), these taxes do not apply in the territories. The application of occupational taxes required of

those dealing with such products is also confined to the States and the District of Columbia.

These sections contain particular references to the Virgin Islands, alone among the territories. (The Virgin Islands ships alcoholic beverages, principally rum, in substantial quantities to the States, and no other territory does so.) The section imposing the gallonage tax on distilled spirits contains a cross reference, at 26 U.S.C. 5001(c), to section 7652. That section provides for the imposition on "articles coming into the United States from the Virgin Islands" of a "tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture" (26 U.S.C. 7652(b)(1)). But such excise taxes on Virgin Islands rum are paid over to the treasury of the Virgin Islands (26 U.S.C. 7652(e)(1)). Related to the foregoing is the special provision for the Virgin Islands at 26 U.S.C. 5314(b), which exempts from the tax imposed by section 7652(b)(1) certain distilled spirits, denatured distilled spirits, and certain related articles that are produced in the Virgin Islands and shipped to the U.S., and which extends to the Virgin Islands such provisions of the internal revenue laws as are necessary in connection with enforcement of the exemption.

26 U.S.C. 5701-5763 - taxes relating to
cigars, cigarettes,
and related articles: Not applicable

The excise taxes imposed on cigars, cigarettes, and related articles (such as cigarette paper, and smokeless tobacco) are imposed on such articles "manufactured in or imported into the United States" (26 U.S.C. 5701), and they thus do not apply in the territories. Occupational taxes on those dealing with such

articles are also confined to those in the "United States."

26 U.S.C. 5801-5872 - taxes relating to machine guns, destructive devices, and certain related firearms:

L a r g e l y
inapplicable

These sections impose taxes on importers, manufacturers, and dealers in certain firearms; on the transfer of a firearm; and on one who "makes" firearms. The term "firearm" includes machineguns, rifles, shotguns, and various other weapons (26 U.S.C. 5845(a)), but does not in the usual case include either pistols or revolvers (26 U.S.C. 5845(e)).

While there is no language within these sections that makes explicit that these taxes apply only within the "United States," equally there is none to suggest that they apply beyond the "United States," as that term is defined in the Internal Revenue Code (to mean the States and the District of Columbia only.) There are, however, several provisions to indicate that the term has that narrow--and usual for Internal Revenue Code purposes--meaning: 26 U.S.C. 5802 refers to "each internal revenue district," and the territories are not included in such a district; the definition of "importer" at 26 U.S.C. 5845(1) means one who brings firearms "into the United States;" certain tax exemptions are provided by 26 U.S.C. 5853 for firearms for a "State" or "possession of the United States"; and authority for the sale of forfeited firearms to a "State" or "possession" is provided at 26 U.S.C. 5872(b). All of these are consistent with the conclusion that the taxes imposed by these sections do not apply in the territories. Hence, the "registry of all firearms in the United

States" required by 26 U.S.C. 5841(a), does not include firearms in the territories.

But within these sections that concern excise taxes on firearms, there appears one non-tax provision that severely restricts the importation of firearms. Under 26 U.S.C. 5844,

No firearms shall be imported or brought into the United States or any territory under its control or jurisdiction unless the importer establishes, under regulations as may be prescribed by the Secretary, that the firearm to be imported or brought in is [for the use of the United States, a State, or a possession].

(Other exceptions to the importation ban follow.) The Virgin Islands, Guam, Samoa, and the Northern Marianas are all under the "control or jurisdiction" of the United States, so this restriction on the importation of firearms applies to each of them.

26 U.S.C. 5881 - greenmail tax:

Not applicable

"Greenmail" refers to consideration received by a shareholder and paid by a corporation to acquire its stock, in the circumstances described in the section. An excise tax of 50% is imposed on the realized gain. Because the tax is an excise tax, it does not apply in the territories.

Federal agency comments: Comments on this memorandum were requested from the Department of Justice and the Internal Revenue Service. All Comments received have been reflected above.

- Subject: (a) Procedure and Administration
(Title 26, Subtitle F, 26 U.S.C. 6001-7872)
- (b) The Joint Committee on Taxation
(Title 26, Subtitle G, 26 U.S.C. 8001-8023)
- (c) Financing of Presidential Election Campaigns
(Title 26, Subtitle H, 26 U.S.C. 9001-9042)
- (d) Trust Fund Code
(Title 26, Subtitle I, 26 U.S.C. 9500-9602)

Comment: These brief Subtitles contain no matters of particular interest to the territories, except for Subtitle F on Procedure and Administration, which contains rules for the administration by the U.S. of Federal taxes applicable to the territories, as well as rules for territorial administration of territorial income taxes. It also contains key sections pertaining to tax administration in the "possessions"--which are the territories subject to this study.

Discussion: (a) Subtitle F on Procedure and Administration (26 U.S.C. 6001-7872) contains very extensive provisions on tax returns, collections, assessments, crimes, judicial proceedings, and the like. These provisions guide the United States in the administration of taxes imposed under the Internal Revenue Code in (among other areas) the "possessions"--i.e., in the Virgin Islands, Guam, Samoa, and the Northern Marianas--and that result is made clear at 26 U.S.C. 7651(1) and (2). But it will be noted that those two paragraphs refer to taxes imposed in a "possession" under "this title," i.e., the Internal Revenue Code. And because the territorial income tax laws are imposed not by the Internal Revenue Code but by other laws (discussed in Memorandum No. 26-1(a)), they do not give the United States authority to collect territorial income taxes. That authority, as discussed in Memorandum No. 26-1, is reposed in each of the territorial governments, under the mirror system.^{1/}

^{1/} In commenting on this memorandum, the Internal Revenue Service has advised that these statements as to the lack of
(continued...)

The territorial governments do, however, have authority with respect to their administration of the territorial income tax laws that parallels that of the United States Government with respect to the Federal income tax laws. In defining which of the "income tax laws" are in force in Guam, the Guam Organic Act, as amended in 1958, includes "all provisions of subtitle F which apply to the income tax, including provisions as to crimes, other offenses, and forfeitures . . ." (48 U.S.C. 1421i(d)(1)). Because the Northern Marianas is a duplicate of Guam as to the income tax laws, under section 601(a) of the Covenant, Subtitle F constitutes a part of the Northern Marianas Territorial Income Tax as well. The same is true in Samoa, where the local law that adopted the Federal income tax as a local law contains the same provision as to Subtitle F as is quoted above from the amended Guam Organic Act (American Samoan Code, sec. 11-0403(a)). Although the Virgin Islands benefits from no such specificity, one may safely assume the application to it, for purposes of the Virgin Islands income

1/ (...continued)

authority of the United States are generally true, but one exception exists in connection with the Virgin Islands. In a letter of January 10, 1991, from the Office of the Associate Chief Counsel (International), the Internal Revenue Service states that

. . . there is a situation where the U.S. would collect what is in effect the territorial tax. Under IRC § 932(c)(4), an individual who is a bona fide resident of the Virgin Islands at the close of the taxable year, reports income from all sources on a return filed with the Virgin Islands and identifies the sources of each such item, and who fully pays his tax liability to the Virgin Islands is entitled to exclude such income from gross income from his U.S. return. This generally means that such an individual would have no gross income and thus would not be required to file a return with the U.S. However, if such an individual fails to report all of his income on the Virgin Islands return, he would have an obligation to file a U.S. return and pay tax to the U.S. on the income that was not reported to the Virgin Islands. In this way, the U.S. can collect what should have been paid as part of the territorial tax.

tax, of Subtitle F, inasmuch as the 1958 legislation for Guam was intended to make explicit the long standing practice in the Virgin Islands, as well as the then current practice in Guam.

Subtitle F contains a number of particular references to the territories, including, for example, a reference at 26 U.S.C. 6091(b)(1)(B) (pertaining to the place for filing returns) to persons who claim the benefits of 26 U.S.C. 931 relating to income from sources within Guam, Samoa, and the Northern Marianas; and a reference at 26 U.S.C. 6103(b)(5)(A) (pertaining to the confidentiality of returns) to officers and employees of all of the territorial governments, plus the Freely Associated States, all by name. But other provisions appear less up-to-date. For example, at 26 U.S.C. 6334(a) certain property is made exempt from levy, including workmen's compensation payments--but only if they are payable under the laws of a State, the District of Columbia, or Puerto Rico (26 U.S.C. 6334(a)(7)). Some of the territories have workmen's compensation laws, and it would seem that they too should be recognized. Similarly, at 26 U.S.C. 6413, special rules are provided in connection with the collection of employment taxes, some of which apply to the territories (as discussed in Memorandum No. 26-3). Yet the special rules are applicable to only Guam and Samoa (26 U.S.C. 6413(a)(3), (c)(2)(D) and (E)). The losses from these possible oversights are probably slight, but expansions to cover all of the territories appear warranted.

The most important provisions of Subtitle F, however, from the standpoint of the territories, are those contained in the Chapter titled "Discovery of Liability and Enforcement of Title." Within that chapter appears the subchapter titled "possessions," containing sections 7651 through 7654. The sections have been referred to from time to time in earlier memoranda on Title 26, but a summary of them may be useful here:

26 U.S.C. 7651, pertaining to the administration and collection by the United States of taxes imposed in the territories by the Internal Revenue Code; this section also contains the provision (at paragraph 5(B))

reducing the effectiveness of the "inhabitant" rule of section 28(a) of the Virgin Islands Organic Act;

26 U.S.C. 7652(b)-(g), which deals with the imposition of internal revenue taxes on Virgin Islands products (principally rum) entering the United States, and their cover-over to the Virgin Islands;

26 U.S.C. 7653, containing provisions (a) imposing in the Virgin Islands on articles imported from the United States a tax equal to any territorial tax on the same article, (b) providing an exemption from Federal tax on articles going into the Virgin Islands, Guam, or Samoa (and by operation of section 601(c) of the Covenant, the Northern Marianas as well) from the United States, and (c) permitting the drawback of taxes paid on articles shipped from the United States to all four areas (with the Northern Marianas included again by operation of section 601(c)); and

26 U.S.C. 7654, providing for the "coordination" of certain aspects of United States and territorial tax administration, for cover-over to the territories, and for the treatment of taxes withheld from military or Federal civilian employees stationed in the territories. (The earlier section 7654, relating to the payment to Guam and Samoa of Federal taxes on coconut oil products shipped from them to the U.S., has been eliminated, doubtless for reasons of obsolescence.)

(b) The Joint Committee on Internal Revenue Taxation, Subtitle G (26 U.S.C. 8001-8023), creates the joint Congressional committee of that name and vests in it oversight over the operation, effects, and administration of internal revenue taxes. Nothing in the Subtitle is of particular concern to the territories.

(c) Subtitle H on the Financing of Presidential Election Campaigns (26 U.S.C. 9001-9042) provides the mechanism for the distribution to candidates of amounts

earmarked by taxpayers on their income tax returns (\$1 per individual under 26 U.S.C. 6096(a)) for the Presidential Election Campaign Fund. These provisions are irrelevant to the territorial income taxes, inasmuch as any amount earmarked by a territorial income taxpayer would be paid to the territorial treasury, and not the United States. Only earmarked amounts in the Federal Treasury are part of the Presidential Election Campaign Fund (26 U.S.C. 9006(a)).

(d) The Trust Fund Code, Subtitle I (26 U.S.C. 9500-9602) currently establishes ten separate trust funds in the U.S. Treasury--such as the Airport and Airway Trust Fund, the Highway Trust Fund, and the Harbor Maintenance Trust Fund--to which proceeds of specified taxes or other receipts are paid, and from which funds are used to support particular Federal programs. The application to the territories of many of the pertinent taxes is explored in Memorandum No. 26-4 on Excise Taxes, and the application to the territories of the particular Federal programs is explored in memoranda respecting those Titles of the Code that authorize them. Subtitle I itself contains nothing of particular interest to the territories.

Federal agency comments: Comments on this memorandum were requested from the Department of Justice and the Internal Revenue Service. All comments received have been reflected above.

Title 27 - INTOXICATING LIQUORS

- Contains nothing of substantial interest to the territories or the Trust Territory.

<u>Memorandum Number</u>	<u>Subject</u>	<u>27 U.S.C. sections</u>
27-1	- (a) Transportation in Interstate Commerce	121-122
	- (b) Federal Alcohol Administration Act	201-212

Subject: Title 27 of the United States Code
Intoxicating Liquors

- (a) Transportation in Interstate Commerce
Title 27, Chapter 6 (27 U.S.C. 121, 122)
- (b) Federal Alcohol Administration Act
Title 27, Chapter 8 (27 U.S.C. 201-212)

Comment: Following the adoption of the Twenty-first Amendment in 1933, most of the Prohibition-era statutes that were contained in Title 27 were repealed or otherwise omitted from the Title. Those that remain appear in Chapters 6 and 8, with those of Chapter 6 (on interstate transportation) being applicable to the territories and the Trust Territory, and those of Chapter 8 (requiring a permit for the importation or sale in interstate commerce of alcoholic beverages) being inapplicable to the territories or the Trust Territory. These results are appropriate.

Discussion: (a) Two sections remain in the chapter entitled Transportation in Interstate Commerce (27 U.S.C. 121, 122), but they are old laws (1890 and 1913, respectively) that have been overtaken by the Twenty-first Amendment. Section 2 of that Amendment states:

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The laws appearing at 27 U.S.C. 121 and 122 are more long-winded but similar in substance. Under 27 U.S.C. 121, intoxicating liquors transported into a "State or Territory", are subject to the laws of "such State or Territory", in the same manner as if produced there; and under 27 U.S.C. 122, transportation into a "State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof", from any of those places, of

intoxicating liquor in violation of any law of such "State, Territory" or noncontiguous place is prohibited.

One need not wonder whether the term "Territory" includes the territories subject to this study, because the Twenty-first Amendment in effect makes clear that it does. And one need not wonder about the Trust Territory, because so long as the Trusteeship Agreement remains in effect, it is clearly a "place noncontiguous to but subject to the jurisdiction" of the United States.

(b) The Federal Alcohol Administration Act (27 U.S.C. 201-212), enacted in 1935, requires a person to obtain a permit from the Secretary of the Treasury in order lawfully to produce, import, transport, or sell in interstate commerce any "distilled spirits, wine, or malt beverages."

The definitions provided in the Act of "United States", "Territory", and "interstate or foreign commerce" (27 U.S.C. 211(a)), make clear that the Act does not apply to any of the offshore areas, except for Puerto Rico, which is expressly named. (The conclusions of the Commissions on the Application of Federal Laws to Guam and the Virgin Islands, 1951 and 1956, respectively, coincide with this result.) The inapplicability of this Act to the territories (and to the Trust Territory) is probably advantageous to them, and need not be disturbed.

Conclusion: The laws contained in Title 27 require no change to meet the needs of the territories or the Trust Territory.

Federal agency comments: None have been sought, because none appear to be necessary.

Title 28 - JUDICIARY AND JUDICIAL PROCEDURE

- * Contains matters of particular interest to the territories, but no legislative recommendations.
- ** Contains recommendations for changes in the law.

Memorandum
Number

Subject

28-1

Judiciary and Judicial Procedure

- * (1) District Courts of the territories and Title 28
- * (2) The exclusion of American Samoa
- * (3) Court provisions in Title 48
- ** (4) Particular provisions of Title 28

Memorandum No. 28-1
June 1987
Revised October 1988

Subject: Title 28 of the United States Code
Judiciary and Judicial Procedure

Comment: Owing to the vigilance of the Department of Justice, the Judicial Conference of the United States, and others, the provisions of Title 28--first enacted into positive law in 1948--are very largely up-to-date and adequate with respect to the District Courts of the Virgin Islands, Guam, and the Northern Marianas. American Samoa is unaffected by Title 28, inasmuch as there is no Federal District Court for American Samoa and no United States Court elsewhere that has jurisdiction generally of cases arising in American Samoa.

Given those general conclusions, and given the substantial bulk of Title 28, there would be little value in examining here the provisions of the Title on the chapter-by-chapter basis that has been used with respect to most other Titles of the Code as they appear in this study. Instead, there follows below a discussion of (1) the District Courts of the territories and how they fit into Title 28, (2) the exclusion of American Samoa, (3) particular statutory provisions in Title 48 of the Code pertaining to the District Courts of the territories, and (4) observations with respect to the application to those District Courts of particular provisions of Title 28. Those observations occasionally contain a suggestion that the term "State", when used in a particular section, should be defined to include a "territory". Title 28 contains no general definition of the term "State", and in the case of most sections of the Title using the term, it is unnecessary, based on the reasoning provided below. A general definition would not be helpful, however, inasmuch as some sections of Title 28 that use the term "State" should not apply to the territories. See the discussion below as to 28 U.S.C. 1251 and 1254. There appears as an Appendix to this Memorandum a listing of all sections of Title 28 that are discussed in part (4), together with an indication as to whether clarifying legislation is desirable.

Discussion: (1) District Courts of the territories and Title 28.
The District Courts of the United States in the States and Puerto Rico are created in Chapter 5 of Title 28. But the

District Courts for the territories are created by other laws, codified in Title 48. Title 28, however, recognizes the existence of the territorial courts, and makes frequent mention of the District Courts of the Virgin Islands and Guam and occasional mention of the District Court of the Northern Mariana Islands.

This apparently disparate treatment results from the fact that the District Courts in the territories are not "courts of the United States" in either the constitutional or statutory sense; and that in turn is the result of the fact that each of the territorial District Courts may by Federal authorizing law be given local jurisdiction, and the fact that their judges are appointed for terms of years.

In the constitutional sense, a "court for the United States" must be one created by the Congress under Article III of the Constitution, with its judges entitled to hold office during good behavior. District Courts of the United States, Courts of Appeals, and the Supreme Court are "Article III" or "constitutional" courts. Other specialized Federal courts, such as the Claims Court, and the Federal courts in the territories, are "legislative courts," having been created by the Congress under its Article I authority, or, in the case of the territories, in the exercise of its Article IV, section 3 territorial power (and they are, thus, sometimes referred to as "territorial courts"). These conclusions have long been accepted by the courts, as explained in, among others, American Insurance Co. v. Canter, 26 U.S. 511, 545-546 (1828), Mookini v. U.S., 303 U.S. 201-205 (1938), and International Longshoremen's and Warehousemen's Union (CIO) v. Wirtz, 170 F.2d 183 (1948).

In the statutory sense, however, the distinction between "constitutional" and "legislative" (or "territorial") courts was blurred by enactment of the 1948 Judicial Code. The District Courts for Hawaii and Puerto Rico--then unarguably territories of the United States--were therein defined as "courts of the United States" (62 Stat. 872, 907), even though their judges were then appointed for terms of years. Those two territorial District Courts had Federal jurisdiction only. The District Courts of Alaska and the Virgin Islands, however,

were not defined as "courts of the United States" by the 1948 Judicial Code, because they--like the District Courts of Guam and the Northern Marianas today--could be granted (and were in fact granted) local as well as Federal jurisdiction. With Statehood, Alaska's District Court ceased to have local jurisdiction, and it has since then (1959) been a "court of the United States" (28 U.S.C. 81A, 451). The District Court of Puerto Rico, however, continued to be defined as a "court of the United States", as it is today (28 U.S.C. 119, 451), even though it was not until 1966 that its judges ceased to be appointed for a term of years and were instead appointed to hold office during good behavior (Pub. L. 89-571).

The effect of the foregoing is that the District Courts in the Virgin Islands, Guam, and the Northern Marianas are not "courts of the United States" in either the constitutional or the statutory sense. Their judges are appointed for ten-year terms, and each court may be vested with local jurisdiction. Because of frequent references to "courts of the United States" in Title 28, and elsewhere in the Code, the conclusion has some importance--but, as explained below, the general extension in 1984 of Title 28 to the territorial District Courts has eliminated most of the questions that previously existed.

(2) The exclusion of American Samoa.

As noted at the outset, Title 28 makes no mention of American Samoa. Samoa's court system, now provided for in the Constitution of American Samoa, is not part of the Federal judicial structure. There is no Federal District Court for American Samoa, and no District Court elsewhere has general jurisdiction over American Samoa (although, as explained at pertinent points throughout this study, in particular instances Congress has vested in the United States District Court for the District of Hawaii jurisdiction of certain Federal cases arising in Samoa; see, for example, the laws discussed in Memorandum No. 33-5(e), (f), (g)). And there is no regular appeal route from the High Court of American Samoa to the Federal judiciary. This absence has been discussed for decades by, among others, the Judicial Conference of the United States, with a variety of solutions proposed: the

creation of a Federal District Court in Samoa, with appeals to the Court of Appeals for the Ninth Circuit; the vesting in the United States District Court of Hawaii of certain jurisdiction arising from Samoa; the conversion of the High Court of American Samoa into a Federal District Court for some purposes; a provision for appeals from the existing High Court to the Ninth Circuit, in appropriate cases. All such proposals have encountered resistance among many Samoans, who perceive any extension of the Federal judicial structure to Samoa as constituting a threat to their native customs and culture, particularly to the matai system and communal property laws and practices. Their fears do not appear to be well-taken, but until the Samoans are persuaded that they face no real threat from a carefully defined extension to Samoa of Federal judicial machinery, legislation on the subject is not likely to succeed.

In the meantime, a recent decision of the United States District Court for the District of Hawaii suggests that the High Court of American Samoa has more extensive jurisdiction in Federal matters than has usually been supposed. In Meaamaile v. American Samoa (550 F. Supp. 1227 (1982)), where the plaintiff alleged mistreatment in a hospital in American Samoa and argued that he was entitled to trial in an Article III (i.e., constitutional) court, the District Court stated:

. . . plaintiff is simply not entitled to a trial in an Article III court. Rather, he is entitled to a trial in the High Court of American Samoa, which is a territorial court duly constituted under Article IV of the United States Constitution

The courts established for American Samoa are not Article III courts, but rather legislative courts created by virtue of the general right of sovereignty which exists in the government and by virtue of Article IV, Section 3, Clause 2 of the United States Constitution, which enables Congress to make all needful rules and regulations

respecting the territory belonging to the United States. . . .

Congress need not make an Article III court available for the adjudication of disputes arising out of events occurring within a United States territory, and has therefore not denied plaintiff any constitutional right by not doing so in this case. Moreover, territorial courts are competent to decide cases arising under the Constitution and laws of the United States. (At pp. 1235-1236.)

The Meaamaile decision is frequently cited in this study, as constituting a possible basis for jurisdiction in the Samoa High Court with respect to particular Federal laws.

Further, developments of recent years suggest that some cases arising in American Samoa may come within the jurisdiction of a United States District Court. In King v. Morton (520 F.2d 1140 (1975)), where the plaintiff sought a jury trial in a criminal case arising in Samoa and, to achieve it, instituted a declaratory judgment action against the Secretary of the Interior in the District Court for the District of Columbia, the Court of Appeals held that

. . . the door of the district court . . . cannot be shut to Samoan plaintiffs properly challenging the lawfulness of the actions of an official of the United States Government. (At p. 1144.)

But, the court said, that "door" is not "open wide to claims properly within the peculiar province of the Samoan courts . . .".

There followed the case of Corporation of the Presiding Bishop v. Hodel, in which the plaintiff sued the Secretary of the

Interior and sought to overturn a decision of the High Court of American Samoa on constitutional grounds. The United States District Court for the District of Columbia concluded that the plaintiff failed to raise a valid Federal or constitutional question (637 F. Supp. 1398 (1986)), and the Court of Appeals affirmed (830 F.2d 374 (1987)). Certiorari was denied (108 S. Ct. 1752).

Hence, although the Federal judiciary machinery does not in general extend to American Samoa, a case arising in Samoa that raises appropriate Federal or constitutional questions may come within the jurisdiction of the Federal judiciary.

(3) Court provisions in Title 48

Laws creating the District Courts for the three territories that have them are codified in Title 48. Judicial provisions for the Virgin Islands are derived from the Revised Organic Act of 1954, as amended (48 U.S.C. 1611-1617); for Guam, from the Guam Organic Act, enacted in 1950, as amended (48 U.S.C. 1424-1424b); and for the Northern Marianas, from Article IV of the Covenant (note following 48 U.S.C. 1681), and the implementing legislation for the court enacted by Public Law 95-157 (1977), as amended (48 U.S.C. 1694-1694c).

For immediate purposes, the foregoing provisions contain five common consequences. (The judicial provisions are not in all particulars precisely parallel, owing to various differences among the three areas, but they are approximately parallel for the following purposes.)

(a) The District Courts of the Virgin Islands, Guam, and the Northern Marianas have in the case of each such court

the jurisdiction of a District Court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of Title 28, and that of a

bankruptcy court of the United States. (48 U.S.C. 1612(a) (Virgin Islands); 48 U.S.C. 1424(b) (Guam); and 48 U.S.C. 1694a(a) (Northern Marianas).)

These three sections--48 U.S.C. 1424(b), 1612(a), and 1694a(a)--are sometimes referred to below as the "Jurisdiction Clause".

(b) Each such court may also, by action of the local legislature, be given jurisdiction of matters arising under local law (48 U.S.C. 1612(b) (Virgin Islands); 48 U.S.C. 1424(c) (Guam); and 48 U.S.C. 1694a(b) (Northern Marianas)). And each district court may also be given, by local law, appellate jurisdiction over the courts established by local law (48 U.S.C. 1613a(a) (Virgin Islands); 48 U.S.C. 1424-3(a) (Guam); and 48 U.S.C. 1649b(a) (Northern Marianas)).

(c) Each jurisdiction is authorized to establish its own appellate court--i.e., in effect a Supreme Court for the territory or commonwealth--but for 15 years following initial establishment of such an appellate court, appeals would be taken not to the Supreme Court of the United States, but instead to the appropriate U.S. Court of Appeals--the Third Circuit in the case of the Virgin Islands, the Ninth in the case of Guam or the Northern Marianas (48 U.S.C. 1613 (Virgin Islands); 48 U.S.C. 1424-2 (Guam); and 48 U.S.C. 1694c(a) (Northern Marianas)). Decisions of the Supreme Court of Puerto Rico are reviewable in the U.S. Supreme Court in the same manner as are decisions of the highest courts of the States (28 U.S.C. 1258). Guam earlier created a territorial Supreme Court so as to achieve direct review by the U.S. Supreme Court, but the U.S. Supreme Court held that the Guam Legislature did not have sufficient authority to create such a court (Guam v. Olsen, 431 U.S. 195 (1977)). The 1984 amendments, contained in Public Law 98-454, overcome that obstacle as to both Guam and the Virgin Islands--with a lag of 15 years during which appeals would continue to be heard by the Court of Appeals. The lag is

based on the consideration that, during the formative years of the new appellate court and while it establishes its institutional traditions, its decision should be reviewable by a court of appeals which is familiar with the local conditions rather than on a discretionary basis by the Supreme Court. (130 Cong. Rec. 10527, 10529, Aug. 10, 1984, daily pagination, Statement of Senator Weicker.)

A similar 15-year lag was enacted for the Northern Marianas in section 403(a) of the Covenant and in Public Law 95-157 (48 U.S.C. 1694c(a)). Guam has not, since enactment of the 1984 authority, established a territorial Supreme Court, nor have the Virgin Islands or the Northern Marianas, so the three territorial District Courts retain appellate jurisdiction over local courts. The 15-year period has not commenced to run in the case of any of them.

(d) In all three territories, the relationship between United States courts, including the District Court for the territory, and the courts established by territorial law, are governed by the same provision:

The relations between the courts established by the Constitution or laws of the United States and the courts established by local law with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings. (48 U.S.C. 1613 (Virgin Islands).)

The Guam and Northern Marianas provisions contain immaterial differences (48 U.S.C. 1424-2 (Guam); 48 U.S.C. 1694c(a) (Northern Marianas)).

There follows in each of the three sections a proviso setting forth the 15-year lag (for direct appeals to the U.S. Supreme Court) referred to above.^{1/}

These three sections--48 U.S.C. 1424-2, 1613, and 1694c--are sometimes referred to below as to "Relations Clause".

(e) The laws contained in Title 28 apply to the District Courts of the Virgin Islands, Guam, and the Northern Marianas where "appropriate". Each is subject to the following provision, enacted in 1984:

Where appropriate, the provisions of . . . Title 28, and . . . the rules of practice heretofore or hereafter promulgated and made effective by the Congress or the Supreme Court of the United States pursuant to Titles 11 [Bankruptcy] . . . and 28 shall apply to the district court and

^{1/} The provisos differ, however, between the Virgin Islands and Guam, on the one hand, and the Northern Marianas, on the other. In the cases of the former two, for 15 years the Court of Appeals has "jurisdiction to review by writ of certiorari all final decisions of the highest court [of the territory] from which a decision could be had" (48 U.S.C. 1613, 1424-2). The Northern Marianas provision, deriving from Article 403(a) of the Covenant and the parallel section 4(a) of Public Law 95-157 which implements it, provides that the Court of Appeals has "jurisdiction of appeals from all final decisions of the highest court of the Northern Marianas Islands from which a decision could be had in all cases involving the Constitution, treaties, or laws of the United States, or any authority exercised thereunder, unless those cases are reviewable in the District Court of the Northern Marianas Islands" (48 U.S.C. 1694c(a)).

appeals therefrom . . . (48 U.S.C. 1614(b)
(Virgin Islands).)

The Guam and Northern Marianas provisions contain immaterial differences (48 U.S.C. 1424-4 (Guam); 48 U.S.C. 1694(c) (Northern Marianas)). These three sections--48 U.S.C. 1424-4, 1614(b), and 1694(c)--are sometimes referred to below as the "Assimilation Clause".

As to when a provision of Title 28 is "appropriate" for application to the territorial court, a sectional analysis prepared by the Justice Department stated that the foregoing quoted language

would have the effect of making the provisions of . . . title 28 generally applicable to all territorial courts. It is intended that . . . the only exceptions to this extension will be those provisions which are in conflict with specific legislation applicable to [the particular territory] . . . and those relating to judges who are appointed during good behavior. (130 Cong. Rec. 10528, 10529, 10530, Aug. 10, 1984, daily pagination, Statement of Senator Weicker.)

Finally, a further provision pertaining to Title 28 appears in the Northern Marianas Covenant as section 403(b), and it was reenacted in Public Law 95-157 in 1977 (48 U.S.C. 1694c(b)):

Those portions of Title 28 which apply to Guam or the District Court of Guam shall be applicable to the Northern Marianas Islands or the District Court for the Northern Mariana Islands

This provision has had reduced effect since the general extension of Title 28 to the Northern Marianas District Court in 1984.

(4) Particular provisions of Title 28

Because Title 28 has been extended generally to the District Courts of the territories, as explained at point (e) above, a full analysis of all chapters of the title is unnecessary. It is necessary, however, to discuss particular sections of the title--sometimes because they contain matters of special interest to the territories, sometimes because they contain references to "State" which include the territories in light of the clauses described above, and in other cases because references to "State" may not include the territories so that legislative clarification would be desirable.

It would be convenient if that clarification could take the form of a general definition of "State" to include the territories for all purposes of Title 28, but that would not be an appropriate way to meet the problem presented by those sections where geographical application is now unclear. Although such an approach has the advantages of brevity and efficiency, it would result in extending some sections that ought not to be extended, sometimes for constitutional reasons, as explained below. Accordingly, it seems necessary to deal with the definition of "State" on a section-by-section basis, with corrective legislation taking the same precise form.^{2/} A list of the sections of Title 28 that are

^{2/} In commenting informally on this memorandum, a Justice Department commentator states the following as to this matter of form:

. . . the question arises whether it is permissible generally to apply references in Title 28 to the term "State" as if it read "territory".

(continued...)

discussed below, together with an indication as to which ones appear to warrant clarifying legislation, appears as an Appendix to this Memorandum.

In the discussions that follow below, reference is sometimes made to comments from the Department of Justice. It should be understood that those comments were and are both tentative and unofficial--as is usually made clear--inasmuch as the Justice Department has not reviewed them fully and may find it necessary at a later point to modify the views expressed.

28 U.S.C. 157 concerns bankruptcy proceedings, and in subsection (b)(3) refers to "State" law. The term in context

2/ (...continued)

In our view, such substitution cannot be made across the board; its permissibility must be determined from case to case, the test being whether the purpose of the 1984 legislation would be frustrated unless the term "State" were read as "territory" or "Commonwealth". For example, the provision giving the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands jurisdiction to maintain habeas corpus proceedings with respect to persons held in custody by territorial authorities would be thwarted, unless the terms State official and State law were also read as applying to territorial officials and territorial law.

Using this test, it would appear that in many important instances the term "State", where used in Title 28, may be read as "territory" or "Commonwealth". The most significant exception appears to be 28 U.S.C. 1251, dealing with the original jurisdiction of the Supreme Court, where for constitutional reasons it does not appear feasible to substitute "territory" for "State".

necessarily includes "territorial" law, particularly since the district courts in the territories explicitly have bankruptcy jurisdiction. An amendment defining "State" for purposes of this section is therefore unnecessary.

28 U.S.C. 332 concerns judicial councils of each circuit, and in subsection (e)(8) refers to "States" and to "State" bar associations. Given other language of the subsection, the territories and territorial bar associations would not be excluded.

28 U.S.C. 333 pertains to judicial conferences of the circuits, and specifies that the judges of the District Courts of the Virgin Islands and Guam are included in the pertinent conference. Guam was included by express amendment to the section in 1951 (65 Stat. 723), as the Guam Commission in 1951 had recommended, but a similar explicit reference to the Northern Marianas is not now needed, because 48 U.S.C. 1694(c) and 1694c(b) in effect provide for the Northern Marianas' inclusion.

28 U.S.C. 517 authorizes the Attorney General to send any officer of the Department of Justice to "any State or district" to handle interests of the United States. The authorization extends to the Virgin Islands, Guam, and the Northern Marianas, all of which are "districts" for this purpose. It would not extend to Samoa.

28 U.S.C. 524(c)(1)(A) authorizes the Department of Justice to reimburse "any Federal, State, or local agency" for certain payments made on behalf of the United States. Although a territorial government might qualify as a "local" agency, an amendment would be desirable to avoid uncertainty.

28 U.S.C. 526 permits the Attorney General to investigate "the clerks of the United States courts and of the District Court of the Virgin Islands . . .", but no reference is made to other territorial courts. The general extension of Title 28 to the District Courts of Guam and the Northern Marianas (48 U.S.C. 1424-4 and 1694(c), respectively), hereafter referred

to, collectively with the Virgin Islands' 48 U.S.C. 1614(b), as the Assimilation Clause, solves this problem. (Prior to the general extension of Title 28, the Attorney General probably could have found authority for such investigations, had he needed it, at 28 U.S.C. 533.)

28 U.S.C. 529(3) requires annual Justice Department reports of violations of Federal criminal laws by officers and employees of "State or local" governments. A territorial government might qualify as a "local" government, but because the Attorney General is to report on matters he deems "appropriate", under section 529(4), violations by territorial officers and employees could be expected also to be included.

28 U.S.C. 534(a)(4) permits the exchange of certain records with officials of "the States, cities, and penal and other institutions". Even if the territories are not "States", their governments are "institutions", so they are included in the section.

28 U.S.C. 545 and 561 contain special provisions for the Northern Marianas only. These sections require generally that U.S. attorneys, assistant U.S. attorneys, and U.S. marshals must reside in the district for which they are appointed, except that the residence requirement does not apply to any such officer "for the Northern Marianas Islands who at the same time is serving in the same capacity in another district". This language permits the appointment for the Northern Marianas of the U.S. attorney, assistant U.S. attorneys, and U.S. Marshalls who have been appointed for Guam, to serve in the same roles in the Northern Marianas. (These are the only sections of Title 28 that apply uniquely to a single territory.)

28 U.S.C. 570 (recently renumbered as 28 U.S.C. 564 by new Drug Control legislation) provides that a United States marshal, when executing the laws of the United States in a State, may exercise the same powers that the sheriff of the State may exercise in executing the laws of the State. This section does not come directly within the scope of the 1984 territorial court legislation. The question whether 28 U.S.C.

570 is applicable to the territories, however, is academic, because none of the present territories has the office of sheriff.

28 U.S.C. 610 defines the courts that are within the jurisdiction of the Administrative Office of the United States Courts. It was expressly amended in 1951 to include the District Court of Guam (65 Stat. 725), as the 1951 Guam Commission had recommended, but an explicit amendment for the District Court of the Northern Marianas is now unnecessary, in light of 48 U.S.C. 1694(c) and 1694c(b).

28 U.S.C. 631(a) provides that

The judges of each United States district court and the district court of the Virgin Islands shall appoint United States magistrates in such numbers and to serve at such locations within the judicial district as the conference may determine under this chapter. In the case of a magistrate appointed by the district court of the Virgin Islands, this chapter shall apply as though the court appointing such magistrate were a United States district court.

In the sectional analysis on the general extension of Title 28 (previously cited, and referred to as the Territorial Courts Act), the Justice Department reported that

. . . the Court of Appeals for the Ninth Circuit has taken the position that it [i.e., 28 U.S.C. 631] does not apply to Guam. (130 Cong. Rec. 10529, Aug. 10, 1984, daily pagination, Statement of Senator Weicker.)

The general extension of Title 28 resolves the question, and magistrates are now authorized for the judicial districts of Guam and the Northern Marianas.

28 U.S.C. 631(b) imposes qualifications for a person appointed to serve as a magistrate, and included is the requirement that he be for five years a member in good standing of the bar of a "State", or the Bar of the District of Columbia, Puerto Rico, or the Virgin Islands. In commenting informally on this memorandum, a Justice Department commentator points out:

Magistrates on Guam or in the Northern Mariana Islands clearly could not meet the requirement of 28 U.S.C. 631(b) that they be "a member in good standing of the bar of the highest court of the State in which he is to serve" unless the term "State" is read so as to include the term "territory". It was the purpose of 48 U.S.C. 1424-2 and 48 U.S.C. 1694(c) to extend the Magistrates Act to Guam and the Northern Mariana Islands. That statutory purpose would be frustrated unless the term "State" in 28 U.S.C. 631(b) were read so as to include "territory".

While that rationale should be enough to permit lawyers in Guam and the Northern Marianas to serve as magistrates, it would be well to avoid argument, and clarification by expanding section 631(b) to make express reference to those two areas would thus be desirable.

28 U.S.C. 959 provides, among other things, that a trustee, receiver, or manager appointed in any cause pending in any United States court, shall manage the property in his possession "according to the requirements of the valid laws of the State in which such property is situated". In commenting informally on this section, the Justice Department observes:

If this clause were read literally, courts of the United States could not appoint any trustees, receivers or managers for property that is not located in a State. In our view, the term "State" includes a territory for two reasons. First, while the Assimilation Clause (48 U.S.C. 1424-4, 1614(b), 1694(c)) refers only to the district courts, it may be read as applying to the officers of the district courts. Second, under the Jurisdiction Clause (48 U.S.C. 1424(b), 1612(a), 1694a(a)) the territorial district judges have the power to appoint trustees, receivers, and managers. That power, however, would be frustrated if those appointees could not also operate or manage property located within the territory in which the district court is located.

There seems no question that "State" includes a "territory" for purposes of section 959, and accordingly clarifying legislation is not necessary.

28 U.S.C. 960 provides that

Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

The purpose of the section is to require bankruptcy trustees and other receivers to pay the same taxes as others not in bankruptcy or receivership, so as to prevent a tax-free business from competing with those that are tax-burdened. The District Courts of the territories, and their officers and agents, are unarguably covered by the provision, in light of the general extension of Title 28. The question remains, however, whether the term "State" includes "territory", so

that taxes imposed by local law in a territory are also required to be paid. The only reasonable conclusion is that the term "State" should be so construed. Although the language of the general extension of Title 28 does not fit precisely (those words being "the provisions . . . of Title 28 . . . shall apply to the district court . . ."), the intent of that general extension was to place the territorial District Courts in the same position, when appropriate, as the United States District Courts in the States. Moreover, 28 U.S.C. 960 would make little sense, in terms of its own function, if taxes imposed by territorial law were excluded. Finally, although the term "State" appears not to have been defined by any court for purposes of 28 U.S.C. 960, it has been defined by the courts for many other purposes under Title 28 to include a "territory", so an expanded reading seems logical and permissible here. See, for example, Examining Board v. Flores de Otero, 426 U.S. 572 (1976), holding the Commonwealth of Puerto Rico to be a "State" for purposes of the "color of State law" provision of 28 U.S.C. 1343(a)(3); Castle & Cook v. Local 137, 110 F. Supp. 247 (1953), which assumes that a court of the Territory of Hawaii is a "State court" for purposes of removal under 28 U.S.C. 1441; and Government of the Virgin Islands v. May, 384 F. Supp. 1035 (1974), holding a municipal court of the Virgin Islands to be a "State court" for purposes of removal under 28 U.S.C. 1442.

But notwithstanding the foregoing, and notwithstanding the likelihood that a court faced with the question would conclude that "State" means "territory" for purposes of 28 U.S.C. 960, it would be desirable if the point were explicitly made. Only then would argument be foreclosed. This could be achieved in a number of ways: through a definition of "State" in section 960, or through a definition of "State" early in Title 28 for purposes of named sections of the Title, including section 960, or through other drafting techniques. The matter appears to be nonurgent, but clarification could prove useful.

28 U.S.C. 994 and 995 concern the United States Sentencing Commission, which is responsible for establishing sentencing guidelines for the Federal criminal justice system. Occasional reference to "Federal, State, local" (28 U.S.C. 994(i)(1) and (4), 995(a)(5)) raise the question of the inclusion of the territories in those sections (although there

is no question as to the application of the guidelines to their Federal courts). Perhaps the term "local" would comprehend them, but because this is arguable it would be better to add to the definitions (at 28 U.S.C. 998) so that "State" includes the Virgin Islands, Guam, and the Northern Marianas.

28 U.S.C. 1251 states the original jurisdiction of the U.S. Supreme Court. The court has original and exclusive jurisdiction of "all controversies between two or more States"; and it has original but not exclusive jurisdiction of, among others, "actions or proceedings by a State against the citizens of another State . . .". In this section the term "State" means precisely that, and it does not include any of the territories. This section is derived from Article III, section 2 of the Constitution. In commenting informally and unofficially on this memorandum, the Justice Department states that any attempt to interpret the section as applicable to litigation involving a territory as a party would raise a serious constitutional question, calling attention to National Mutual Insurance Co. v. Tidewater Co. (337 U.S. 582 (1949)). The Justice commentator therefore states that it would not be "appropriate", as that term is used in the Assimilation Clause (48 U.S.C. 1424-4, 1614(b), and 1694(c)), to conclude that a territory is a "State" for purposes of 28 U.S.C. 1251. If the Congress were to provide a clear statutory mandate for such a definition, there could well be a further constitutional argument--and since there has been no audible territorial request on this point, it seems wisest to refrain from legislative action.

28 U.S.C. 1252 was repealed in 1988 by Public Law 100-352. It had permitted a direct appeal to the Supreme Court from a decision holding an Act of Congress to be unconstitutional from, among others, any court of the United States, the District Court of Guam, and the District Court of the Virgin Islands. Although the District Court of the Northern Marianas was unmentioned, it too would have been comprehended under either 48 U.S.C. 1694c(a), or 48 U.S.C. 1694c(b), or section 502(a)(2) of the Covenant.

28 U.S.C. 1254 was amended by Public Law 100-352, approved June 27, 1988, to eliminate former paragraph (2). Section 1254(2) had authorized an appeal to the Supreme Court from a court of appeals if a "State" statute has been held to be invalid as repugnant to the Constitution, treaties, or laws of the United States. Public Law 100-352 repealed the appeal provision at (2), retaining only the certiorari provision at (1) and the certification provision at (3), which is now renumbered as (2). But the former section 1254(2) had some history of interest to the territories, and it is instructive as to the Supreme Court's disposition to disfavor expansion of its jurisdiction of appeals, so some comment on the former section 1254(2) is offered here. It seems probable that the term "State" did not include a territory for purposes of that section, notwithstanding the Assimilation and Relations Clauses, in light of Fornaris v. Ridge Tool Co. (400 U.S. 41 (1970)), a case involving a Puerto Rican statute. In a note in that decision (42, n. 1), the Supreme Court stated in pertinent part:

Appellants invoked 28 U.S.C. sec. 1254(2) as the authority for these appeals. That provision provides that a judgment in the Court of Appeals may be brought here "[b]y appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution. . . ." But a Puerto Rican statute is not a "State statute" within section 1254(2). . . . It is true that statutes enacted in 1961 require that this Court treat the Puerto Rican courts as the equivalent of state courts for purposes of appeal and certiorari. It is expressly provided in 75 Stat. 417, 28 U.S.C. sec. 1258, that "[f]inal judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico" may be reviewed by this Court by appeal, or by writ of certiorari. . . . Significantly, however, no parallel provision was added to sec. 1254(2) to permit appeals here from the courts of appeals by a party relying on a Puerto Rican statute. Whether the omission was by

accident or by design, our practice of strict construction of statutes authorizing appeals dictates that we not give an expansive interpretation to the word "State". . . . We therefore hold that the appeals are improper and they are dismissed, and accordingly we treat the jurisdictional statements as petitions for writs of certiorari and grant them on that basis

The question of the territories' inclusion is moot in light of Public Law 100-352, but the Court's view may have relevance to the territories in other connections.

28 U.S.C. 1257 provides for the review by the U.S. Supreme Court of decisions of "the highest court of a State". (A parallel provision for Puerto Rico appears at 28 U.S.C. 1258.) Since neither the Virgin Islands, Guam, nor the Northern Marianas has yet created an appellate court, the section does not yet apply to any of them. But it will do so under the Relations Clause (48 U.S.C. 1424-2, 1613, 1694c) when these areas act to establish the appellate courts that are authorized by 48 U.S.C. 1424-1(a) (Guam), 48 U.S.C. 1611(a) (Virgin Islands), and 48 U.S.C. 1694b (Northern Marianas), and after the 15-year lag time has expired.

28 U.S.C. 1291 provides for appeals from, among others, the District Courts of the Virgin Islands and Guam to the courts of appeals. No reference is made to the District Court of the Northern Marianas, but appeals from it to the court of appeals are in effect provided for by 48 U.S.C. 1694c(b) and 1694c(b). The same result follows with respect to 28 U.S.C. 1292. And under 12 U.S.C. 1294, which specifies the circuits in which District Court decisions are reviewable, the Northern Marianas (again unmentioned) would be placed in the Ninth Circuit by virtue of 48 U.S.C. 1694c(b). (But note that the District Court of the Northern Marianas, in the company of those of the Virgin Islands and Guam, is expressly referred to in 28 U.S.C. 1295, pertaining to the jurisdiction of the Court of Appeals for the Federal Circuit.)

28 U.S.C. 1332 grants diversity jurisdiction to U.S. district courts. Although some of the District Courts of the territories may have had such jurisdiction prior to 1984, the Supreme Court squarely held in Chase Manhattan Bank (N.A.) v. South Acres Development Corporation (434 U.S. 236 (1978)) that the District Court of Guam did not. Public Law 98-454 of 1984 dealt as squarely with the matter, by providing expressly that the District Courts of the Virgin Islands, Guam, and the Northern Marianas each had "the diversity jurisdiction provided for in section 1332 of Title 28" (48 U.S.C. 1612(a) (Virgin Islands); 48 U.S.C. 1424(b) (Guam); and 48 U.S.C. 1694a(a) (Northern Marianas)).

28 U.S.C. 1333 gives to the Federal district courts original jurisdiction in civil admiralty cases and in prize proceedings, "exclusive of the courts of the States". Under the Relations Clause (48 U.S.C. 1424-2, 1613, and 1694c), the phrase "courts of the States" includes "courts of the territories" that are created by territorial law.

28 U.S.C. 1334 deals with the bankruptcy jurisdiction of Federal district courts, providing for their exclusive jurisdiction, except that they may abstain from asserting exclusive jurisdiction when the interest of justice or "the interest of comity with State courts or respect for State law" warrants (subsection (c)(1)), or when the proceeding is based on "State law" and is commenced "and can be timely adjudicated in a State forum of appropriate jurisdiction" (subsection (c)(2)). In the foregoing instances, the term "State" includes "territorial", in light of both the Relations Clause (48 U.S.C. 1424-2, 1613, 1694c) and the Assimilation Clause (48 U.S.C. 1424-4, 1614(b), 1694(c)).

28 U.S.C. 1341 denies to "district courts" the authority to enjoin the assessment, levy, or collection of a tax under "State" law, where an appropriate remedy exists in the courts of the "State". The district courts in the Virgin Islands, Guam, and the Northern Marianas would be similarly constrained, in light of the Jurisdiction Clause (48 U.S.C. 1424(b), 1612(a), 1694a(a)) and the Relations Clause (48 U.S.C. 1424-2, 1613, 1694c). A tax under "State" law would

necessarily include a tax under "territorial" law, lest the section be deprived of all meaning.

28 U.S.C. 1342 denies to "district courts" the authority to enjoin certain rate orders of a "State" administrative agency, and for the reasons stated above for 28 U.S.C. 1341, the term "State" includes the territories.

28 U.S.C. 1343 grants to "district courts" jurisdiction in certain civil rights and elective franchise cases. The section gives pause, because of its reference in section 1343(a)(3) to a deprivation "under color of any State law", and because it was amended in 1979 to provide that "the District of Columbia shall be considered to be a State" (28 U.S.C. 1343(b)(1)). But in Examining Board v. Flores de Otero (426 U.S. 572 (1976)), the Supreme Court held that Puerto Rico is a "State" for purposes of the "color of State law" provision at 28 U.S.C. 1343(a)(3), and that the Federal District Court of Puerto Rico, both before and after the creation of the Commonwealth in 1952, had the same jurisdiction under 28 U.S.C. 1343(a)(3) as the U.S. district courts in the States. That holding, together with the Jurisdiction Clause (48 U.S.C. 1424(b), 1612(a), 1694a(a)), are sufficient to eliminate doubt as to the jurisdiction of the District Courts of the Virgin Islands, Guam, and the Northern Marianas under 28 U.S.C. 1343.

28 U.S.C. 1344 gives to the district courts jurisdiction in election disputes when the sole issue is the denial of the right to vote, except when the election concerns an "elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature". The territorial District Courts would have that jurisdiction, with the exceptions stated, but the question arises as to whether the exception of a "member of a state legislature" would include as well a "member of a territorial legislature". The answer could be that it does not--inasmuch as the Congress did not entirely overlook the territories (given the reference to the office of "delegate"), so one can reasonably assume that "State" meant or means just that. Since territorial legislatures, like state legislatures and Federal legislators, commonly consider it their

prerogative to judge the selection of their members--and since the Organic Acts and the Northern Marianas Constitution so provide--the office of member of a territorial legislature should also be excluded expressly from the jurisdictional grant. An amendment is therefore desirable, to avoid a conflict, or at least uncertainty.

28 U.S.C. 1346 defines the jurisdiction of Federal district courts in certain actions in which the United States is the defendant. Given the Jurisdiction Clause (48 U.S.C. 1424(b), 1612(a), 1694a(a)), there is no doubt that the District Courts in the three territories have the jurisdiction specified. A comment concerning subsection (b), however, is warranted. That subsection concerns jurisdiction of tort claims against the United States under chapter 171 of Title 28 (see the discussion below as to 28 U.S.C. 2680), and it provides for jurisdiction in district courts and, expressly, the District Court of the Virgin Islands. The failure to specify the District Courts of Guam and the Northern Marianas is, however, untroublesome (and is explained by the fact that the Virgin Islands, alone of these three areas, had a District Court in 1948 when the Federal Tort Claims Act was enacted), because they too have the jurisdiction specified in section 1346(b) in light of the Jurisdiction Clause.

28 U.S.C. 1348 provides for jurisdiction in the district courts of certain proceedings involving national banks, and further provides that for purposes of such proceedings, the banks are to be "deemed citizens of the States in which they are respectively located". Inasmuch as the "provisions of all Acts of Congress relating to national banks shall apply in . . . the several Territories and possessions of the United States" (12 U.S.C. 42, see Memorandum No. 12-2), there can be no doubt that "States" includes "territories" for purposes of 28 U.S.C. 1348.

28 U.S.C. 1352 grants jurisdiction to the district courts, "concurrent with State courts", of any action on a bond executed under Federal law. Under the Relations Clause (48 U.S.C. 1424-2, 1613, 1694c), the term "State courts" includes local territorial courts.

28 U.S.C. 1354 provides for district court jurisdiction of actions "between citizens of the same state claiming lands under grants from different states." The territories splendid insularity suggests that no question under this section could ever arise in any of them.

28 U.S.C. 1355 gives to the district courts jurisdiction, "exclusive of the courts of the States", of actions for the recovery of fines or penalties incurred under Federal law. Under the Relations Clause (48 U.S.C. 1424-2, 1613, 1694c), local territorial courts would also be excluded from jurisdiction.

28 U.S.C. 1356 similarly gives to the district courts jurisdiction, "exclusive of the courts of the States", of certain seizures under Federal law, and again because of the Relations Clause, local courts of the territories would also be excluded.

28 U.S.C. 1357 gives jurisdiction to the district courts

of any civil action commenced by any person to recover damages for any injury to his person or property on account of any act done by him, under any Act of Congress, for the protection or collection of any of the revenues, or to enforce the right of citizens of the United States to vote in any State.

It is hard to be sure what most of that language means, and the few cases decided under the section are of little help. But the relevant question is whether the last phrase, concerning the right to vote in any "State", includes the right to vote in a territory. In light of the discussion above concerning 28 U.S.C. 1343, which concludes that that section, which also deals with elective franchise cases, must be read to include "territory" in the term "State", one should conclude that "State" in section 1357 must also be read to include the territories.

28 U.S.C. 1365 confers upon the District Court for the District of Columbia jurisdiction of a civil action brought by the U.S. Senate or one of its committees or subcommittees to enforce a subpoena (for documents, a deposition, or testimony) issued to "any entity acting or purporting to act under color or authority of State law". There does not appear to be any theory, or any provision of the 1984 territorial court legislation, that leads easily to defining "State" to include a territory under this section. Equally, there appears to be no valid reason to exclude "any entity acting or purporting to act under color or authority of" territorial law from the court jurisdiction provided. Accordingly, an amendment to define "State" explicitly to include a "territory" is warranted.

28 U.S.C. 1391-1412 pertain to district court venue, and they apply to the territories and their district courts generally as a result of the 1984 territorial court legislation (Public Law 98-545). When it appears in these sections, the term "State" thus generally includes the territories. A few sections warrant comment:

-- 28 U.S.C. 1392, 1399, and 1403 deal with multidistrict "States". These sections are in fact inapplicable to the territories because each constitutes a single district only, but they are theoretically applicable under the Assimilation Clause (48 U.S.C. 1424-4, 1614(b), 1694(c)).

-- 28 U.S.C. 1393, 1404, and others refer to divisions of the district court. These references apply to the Virgin Islands only, because it alone among the territories has more than one division (48 U.S.C. 1615).

-- 28 U.S.C. 1395(e) concerns proceedings for the forfeiture "of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection". The section, dating from the

Civil War, may be obsolete, but in any case a territory could be viewed as a "section".

-- 28 U.S.C. 1409 and 1410(a) both relate to certain bankruptcy proceedings, and they both refer to a "State" court. Under the Relations Clause (48 U.S.C. 1424-2, 1613, 1694c), the term "State" court would include a local territorial court.

28 U.S.C. 1441-1452 pertaining to the removal of cases from "State" courts to district courts, have given rise to considerable litigation as to whether the term "State" includes a "territory"--with the cases not in harmony. Part of the difficulty arose in the past because of the express definition of the term to include the District of Columbia (28 U.S.C. 1451). But the question has been laid to rest with enactment of the Relations Clause in Public Law 98-454 of 1984, which states in the case of each of the territorial district courts that the provisions of Title 28 "with respect to . . . removal of causes" apply to such courts (48 U.S.C. 1613 (Virgin Islands); 48 U.S.C. 1424-2 (Guam); and 48 U.S.C. 1694c(a) (Northern Marianas)). The many references in these sections to "State" courts therefore necessarily include local territorial courts, and references to citizens of "States" and laws of the "State" (e.g., 28 U.S.C. 1441(b), 1442(b), 1445(c)) necessarily mean citizens and laws of the territories as well.

28 U.S.C. 1602-1611 contain the Foreign Sovereign Immunities Act of 1976, which sets forth certain principles with respect to the claims of foreign states to immunity from jurisdiction, for the guidance of "courts of the United States and of the States" (28 U.S.C. 1602). It is clear that the territorial District Courts, because they have the same jurisdiction as District Courts of the United States, must be so guided. The question arises as to the effect of the law upon courts created by territorial law, since the term "courts of the States" is undefined. It was doubtless the Congress' intent to cover them as well, inasmuch as the "United States" is very broadly defined--to include "all territory and waters, continental or insular, subject to the jurisdiction of the United States" (28 U.S.C. 1603(c)). That should be sufficient

to require adherence to the principles of the law by courts created by the Virgin Islands, Guam, and the Northern Marianas. And it is probably sufficient as well to guide the courts of American Samoa.

In commenting informally on the foregoing conclusions with respect to the Foreign Sovereign Immunities Act, a Justice Department commentator has generally concurred, stating the following:

These sections [of the Foreign Sovereign Immunities Act] use throughout the term "courts of the United States and of the States". There is no question that by operation of the jurisdiction and assimilation clauses the term "courts of the United States" includes the Federal territorial courts.

For the following reasons, it appears from the statutory purpose that the term "courts of the United States and the States" is designed also to encompass the local territorial courts. The first sentence of section 1602 contains the "central premise" (see H.R. Rept. No. 1487, 94th Cong. 2d Sess. 14 (1976)) of the legislation, namely the Congressional finding that claims of foreign states of immunity from the jurisdiction of United States courts should be determined by those courts, rather than, as previously, by the Executive branch (H.R. Rept. No. 1487, 94th Cong. 2d Sess. 7, 8-9 (1976)). This "central premise" is based on the notion that this method of determining sovereign immunity would serve the interests of justice and the rights of both foreign states and litigation in United States courts. The third sentence of section 1602 provides that henceforth claims of foreign states to immunity shall be decided by courts of the United States

and of the States in accordance with the principles set forth in sections 1603 through 1611. Section 1604 establishes the general rule that a foreign state is immune from the jurisdiction of the courts of the United States and of the States, except as provided in sections 1605 to 1607. Those sections enumerate the situations in which foreign states are not immune from the jurisdiction of the courts of the United States and of the States. Sections 1608 and 1609 deal with procedural questions, such as service, time to answer, and default judgments, applicable to actions against foreign states pending in the courts of the United States and of the States. Sections 1609 to 1611 deal with the question of immunity of the property of foreign States from attachment and execution.

It will be noted that the first sentence of Section 1602 uses the term "United States courts", while the balance of this chapter refers to "courts of the United States and of the States". Section 1603(c) defines the term "United States", as including "all territory and waters, continental and insular, subject to the jurisdiction of the United States". Hence, the term "United States courts" includes all courts within the areas subject to the jurisdiction of the United States, i.e., all Federal and State courts, and all Federal and local territorial courts. The term "courts of the United States and of the States" clearly includes the Federal territorial courts; the problem, however, is whether it also includes the local territorial courts. If the term "courts of the United States and of the States" is read literally, the local territorial courts are not included in it. This reading, however, would lead to absurd results. First, it would mean

that the first sentence of section 1602 would apply to the local territorial courts, but that the rest of the Foreign Sovereign Immunities Act would not. Second, this result would be inconsistent with the purpose of the Act to establish a uniform body of law throughout all areas subject to the jurisdiction of the United States. H.R. Rept. No. 1487, supra, 7, 8-9, 13, 32. See, also, Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487-488, 489, 497 (1983). Verlinden, indeed, reads the Act as applying to any court in the United States (461 U.S., at 497), a term which includes the local territorial courts. The statutory goal of the Foreign Sovereign Immunities Act accordingly is its uniform application throughout all areas subject to the jurisdiction of the United States. This statutory program can be achieved only by interpreting the phrase "courts of the United States and of the States" as including the local territorial courts.

A further problem is created by 28 U.S.C. 1605(b) which deals with the commercial activity exception to the immunity from suit of foreign sovereigns in the courts of the United States, where a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of a foreign State. This subsection does not refer to the courts of the States presumably because the Federal courts have exclusive jurisdiction over such proceedings under 28 U.S.C. 1333. There are, however, some indications that, in view of the absence of a Federal district court having jurisdiction over American Samoa, the local territorial courts of American Samoa possess some admiralty jurisdiction. Meaamaile v. American Samoa, 550 F. Supp. 1227, 1236-1238 (1982). This raises the

question whether in the case of an in rem admiralty proceeding in American Samoa involving a vessel or cargo belonging to a foreign state, the commercial activity exception of 28 U.S.C. 1605(b) applies. (Emphasis as in original.)

While the answer is obviously not free from doubt (and the Justice commentator offers no conjecture on the point), it would seem likely that if a Samoa court had admiralty jurisdiction under Meaamaile--as seems probable--then the exception contained in section 1605(b) would also apply in Samoa. (That would mean that in an admiralty proceeding in the High Court of American Samoa, to enforce a maritime lien against a vessel or cargo of a foreign state, such foreign state could not claim immunity if the "maritime lien is based upon a commercial activity of the foreign state" (28 U.S.C. 1605(b)).)

It is clear, however, from the number of words needed to reach the conclusions stated above as to the Foreign Sovereign Immunities Act, that its application to local territorial courts should be clarified. This could easily be accomplished by inserting a definition of "State" at 28 U.S.C. 1603 to include the Virgin Islands, Guam, Samoa, and the Northern Marianas. It is so recommended.

28 U.S.C. 1652 restates a venerable rule of decision:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Prior to 1984, there existed uncertainty as to whether the phrase "laws of the several states" meant also the "laws of the territories". The Supreme Court held that it did in the

Territory of Hawaii (U.S. v. Fullard-Leo, 331 U.S. 256 (1947)), stating that

. . . in matters of local law the federal courts defer to the decisions of the territorial courts . . . (at p. 269).

And the Ninth Circuit held in the case of Guam (Guamataotao v. Government of Guam, 322 F.2d 580 (1963)), that

. . . decisions of local courts of United States territories on matters of purely local law will not be reversed unless clear and manifest error is shown. (At p. 582.)

But the same Court of Appeals had earlier held, for reasons equally applicable to the current territorial courts, that deference was not due decisions of the District Court for the Territory of Alaska, because the District Court there had both local and Federal jurisdiction (Carscadden v. Territory of Alaska, 105 F.2d 377, 383 (1939)).

It might appear that no question should now exist, on the ground that the general extension in 1984 of Title 28 (the Assimilation Clause, discussed at (e) above) to the District Courts of the Virgin Islands, Guam, and the Northern Marianas should seem to mean that they are subject now to the rule set forth at 28 U.S.C. 1652. But uncertainty in fact continues.

Comments from the Justice Department in 1988 suggest that the matter is not clear. Those comments, citing other cases, state that 28 U.S.C. 1652

provides in substance that the laws of the several States shall be regarded as rules of decision in civil actions in courts of the United States. It has been held that the Rules of Decision Act does not apply to

the territories. Waialua Co. v. Christian, 305 U.S. 91, 104 (1938). Instead, the courts of the United States are required to defer to the decisions of the local territorial courts on local law in the absence of manifest error. De Castro v. Board of Commissioners, 322 U.S. 451, 455-459 (1944); People of the Territory of Guam v. Fejeran, 687 F.2d 302, 303 (1982), cert. denied, 460 U.S. 1045 (1983). This leaves open the question whether the Rules of Decision Act has become applicable to the Federal territorial courts as the result of the jurisdiction clause, or whether the De Castro rule of deference continues to apply.

After the foregoing Justice Department comments were written, further uncertainty was created by the 9th Circuit's decision in People of Territory of Guam v. Yang, 850 F.2d 507 (1988). The Court of Appeals there held that decisions of the Appellate Division of the District Court of Guam were not entitled to deference, because the judges sitting in that Division are largely visitors from outside Guam, and thus not necessarily familiar with Guam's local law and customs. The court adopted a "strict de novo standard of review for determinations of Guam law by the Appellate Division," noting this to be consistent with the 3d Circuit's treatment of Virgin Islands cases in Saludas v. Ramos, 744 F.2d 992 (1984).

Under the circumstances, it would be well to add to 28 U.S.C. 1652 a definition of "states" to include the Virgin Islands, Guam, and the Northern Marianas. The Department of Justice commentator, however, has expressed (informally and tentatively) doubt as to whether such a definition is needed. It is recommended here, notwithstanding that doubt, in the interest of clarity and in the further interest of according to the laws of the territories the same dignity that the laws of the States receive.

28 U.S.C. 1655 deals with the method of service in actions to foreclose a lien in a district court if any defendant "cannot

be served within the State". The section authorizes the court to order the absent defendant to appear and plead by a certain day. Under the Jurisdiction Clause (48 U.S.C. 1424(b), 1612(a), and 1694a(a)), the Federal District Courts in the territories have the authority to issue such order.

28 U.S.C. 1861-1869 concern jury selection. Some of these provisions dealing with juries, especially those derived from the Jury Selection and Service Act of 1968, are applicable by their terms to the selection of juries in at least some of the territories and in the Federal territorial courts (e.g. 28 U.S.C. 1863(b)(6)(iii), 1869(f)). Other provisions, however, refer only to "State, local and Federal officials", or to convictions in a "State or Federal court" (28 U.S.C. 1863(d), 1865, 1869(h)).

This inconsistency particularly pervades 28 U.S.C. 1869, which contains the definitions governing this chapter 121 of Title 28. Thus, 28 U.S.C. 1869(c), which defines the term "voter registration lists", contains a specific definition referring to Guam and the Virgin Islands, and 28 U.S.C. 1869(f) defines the term "district court of the United States" so as to include the district courts of Guam and the Virgin Islands. (The District Court of the Northern Marianas would be covered by 28 U.S.C. 1869(f), pursuant to 48 U.S.C. 1694c(b), but no provision of existing law would operate to extend 28 U.S.C. 1869(c) to the Northern Marianas.) On the other hand, 28 U.S.C. 1869(h), which prescribes the content of the juror qualification form, refers to the pendency of charges for the commission of a "State" or Federal criminal offense, and to the conviction in a "State" or Federal court of record. Similarly, section 28 U.S.C. 1865(b) refers only to "State" or Federal courts. Section 1863 of Title 28 is equally inconsistent: 28 U.S.C. 1863(b)(6)(ii) and (iii) grant occupational exemptions to certain territorial officers. Subsection (d), on the other hand, dealing with the duty of certain officials to make voter registration and similar lists available to the jury commission, refers only to "State", local, and Federal officials. As has been stated above, it is questionable, whether the term "local officials" includes officials of the local territorial government.

Given the Congress' stated purpose in enacting these sections (28 U.S.C. 1861), and given its references to some of the territories from time to time, it seems correct to assume that it was intended that "State" include any territory that has a Federal district court. But to eliminate uncertainty arising from the uneven treatment accorded the territories, it would be wise to add a definition of "State" at 28 U.S.C. 1869 to include the Virgin Islands, Guam, and the Northern Marianas.

28 U.S.C. 1961, 1962, and 1964 pertaining to pending actions, and judgments, use the term "State", but in each case the term must be read to include the territories in light of the Assimilation Clause (48 U.S.C. 1424-4, 1614(b), and 1694(c)).

28 U.S.C. 2002 requires that a sale of realty under a district court judgment must be preceded by notice in a newspaper published in the "state", county, or judicial district where the realty is located. Since the territories comprise a single district each, and none has counties, publication in the judicial district would meet the statutory requirement.

28 U.S.C. 2005 and 2007 pertaining to executions and judicial sales, also use the term "State", but the term includes the territories in light of both the Assimilation Clause (48 U.S.C. 1424-4, 1614(b), and 1694(c)) and the Jurisdiction Clause (48 U.S.C. 1424(b), 1612(a), and 1694a(a)).

28 U.S.C. 2101(d), 2102, and 2104 concern review of "State" court decisions by the Supreme Court, a matter that is now academic and will remain so until the territories establish their own appellate courts and until the 15-year lag-time has expired (see part (c) of section (3) above). When that time has expired, the Relations Clause (48 U.S.C. 1424-2, 1613, and 1694c) will serve to define "State" to include the qualifying territory. These sections are all subject to a definition, enacted in 1970, which in effect makes the District of Columbia a "State" (28 U.S.C. 2113). But that definition must be read as having been expanded by the later-enacted Relations Clause, at such time as decisions from the territorial appellate court no longer are the responsibility of the Courts of Appeals.

In commenting informally on this memorandum, a Justice Department commentator observes that section 2102

provides for a priority in the Supreme Court docket for criminal cases on review from State courts. At present the review of the decisions of the local territorial courts does not go directly to the Supreme Court, but to the Appellate Divisions of the District Courts and then to the Courts of Appeals. This raises the question whether the review of a Court of Appeals decision in a criminal matter that originated in a local territorial court is entitled to priority under this section. We would leave the decision on this issue to the clerk of the Supreme Court.

That constitutes a splendid response to the question.

28 U.S.C. 2241-2255, on the subject of habeas corpus, apply unambiguously to the territorial district courts, because habeas corpus is among the matters specifically named in the Relations Clause (48 U.S.C. 1424-2, 1613, and 1694c). The references to "State" within these sections (28 U.S.C. 2241, 2244, 2251, 2252, 2253 and 2254), necessarily include the Virgin Islands, Guam, and the Northern Marianas because their territorial district courts could not exercise their habeas corpus jurisdiction under the Jurisdiction Clause unless their writs run against local authorities and local courts, or unless they are available to persons held in custody by virtue of local territorial law. These matters are covered by the Relations Clause.

28 U.S.C. 2283 concerns the power in courts of the United States to stay "State court proceedings". The section applies to the territorial district courts by virtue of the Assimilation Clause (48 U.S.C. 1424-4, 1614(b), and 1694(c)) and to local territorial courts by virtue of the Relations Clause (48 U.S.C. 1424-2, 1613, and 1694(c)).

28 U.S.C. 2284 requires the convening of a three-judge court when "required by Act of Congress" or

when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

The question is whether a "statewide legislative body" includes a territorial legislature. It would appear that the Assimilation Clause (48 U.S.C. 1424-4, 1614(b), and 1694(c)) may have that effect, because it extends Title 28 generally to territorial district courts. But the question is complicated by judicial decisions, and in commenting informally on this memorandum, a Justice Department commentator states that the question has "no easy answer". The commentator continues:

Prior to its repeal in 1976, 28 U.S.C. 2281, the predecessor to section 2284, required the convening of a three-judge court in litigation seeking injunctive relief to restrain the enforcement of a State statute. The Supreme Court held in Stainback v. Ho Hock Ke Lok Po, 336 U.S. 368 (1949), a case involving the then Territory of Hawaii, that 28 U.S.C. 2281, did not apply to actions seeking to enjoin the enforcement of a territorial statute for two reasons. First, the purpose of 28 U.S.C. 2281 was to avoid unnecessary interference with the laws of a sovereign State, a consideration which did not apply to the Territories which are subject to congressional regulation. 336 U.S. at 377-378. Second, neither the statutory language nor the legislative history relating to the convening of three-judge courts contain any reference to the Territories.

In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 669-676 (1974), decided a quarter of a century after Stainback, the Court adhered in principle to its view that 28 U.S.C. 2281 is not "a measure of broad social policy to be construed with great liberality". 416 U.S. at 675. The Court nevertheless held that the Commonwealth of Puerto Rico is a State within the meaning of 28 U.S.C. 2281, in view of "the established federal judicial practice of treating enactments of the Commonwealth of Puerto Rico as 'State statute[s]' for purposes of the Three-Judge Court Act". Ibid. In the absence of any consistent federal judicial practice treating the enactments of Guam, the Virgin Islands, or the Commonwealth of the Northern Mariana Islands as State statutes, the rationale of Calero-Toledo cannot be applied to those territories.

As stated above, 28 U.S.C. 2281, which generally required the convening of a three-judge court in any litigation seeking to enjoin the enforcement of a State statute, was repealed in 1976 on the ground that it placed an excessive burden on the federal court system. S. Rep. No. 204, 94th Cong., 1st Sess. 2-9 (1975). Section 2281 was replaced by Section 2284 which requires the convening of a three-judge court only when specifically required in acts of Congress, or in cases "challenging the constitutionality of the apportionment of Congressional districts or the apportionment of any state-wide legislative body". The question is whether the term "state-wide" in 28 U.S.C. 2284 is to be interpreted as narrowly as the term "State" in former 28 U.S.C. 2281. The latter approach would appear supported by one aspect of the legislative history of section 2284. According to the Senate

Report, the Senate Committee submitted the bill to the Attorneys General of the fifty States because the legislation "would be of concern to the States". S. Rep. 204, 94th Cong., 1st Sess. 9 (1979). The Committee apparently did not believe that the legislation would affect the territories. On the other hand, Section 2284, being limited to specific statutes and to the issue of the malapportionment of a legislature, casts a far lighter burden on the federal judiciary than the former section 2281. Moreover, S. Rep. 204 pointed out (at p. 9) that three-judge courts are specifically required for the review of certain cases arising under the Civil Rights and Voting Rights Act, most of which apply to the territories. Hence, in those cases, three-judge courts are already operating in the territories. See e.g., 42 U.S.C. 1971(g), (Voting Rights Act); 42 U.S.C. 2000e(6)(b) (Title VI of the Civil Rights Act of 1964, Equal Employment Opportunities). Since malapportionment and voting rights are in pari materia, an argument can be made that section 2284 also provides for three-judge courts in cases involving the constitutionality of the apportionment of territory-wide legislative bodies.

In any event, this issue should be clarified (a) because of the complex legal problems that arise when the requirement of a three-judge court is questionable (S. Rep. 204, at pp. 6-7), and (b) because this problem already has arisen, and is likely to arise again, in connection with Section 203(c) of the Covenant with the Northern Mariana Islands which departs from the One-Man-One-Vote rule.

To eliminate uncertainty, therefore, 28 U.S.C. 2284 should be amended to make clear that a territorial legislature is comprehended by the term "statewide legislative body".

28 U.S.C. 2361 concerns interpleader and provides that the district court in which an interpleader action is pending may restrain all claimants from instituting or maintaining any proceeding in any "State" or United States court affecting the property involved in the interpleader. A "State" court would include a local territorial court in view of the Jurisdiction Clause (48 U.S.C. 1424(b), 1612(a), and 1694a(a)) and the Relations Clause (48 U.S.C. 1424-2, 1613, and 1694(c)).

28 U.S.C. 2403(b) provides that in a suit in a Federal court involving the constitutionality of a "State" statute, to which the "State" is not a party, the court shall certify that fact to the "State" Attorney General and permit the State's intervention. The procedure would apply in the territories, in light of the Jurisdiction Clause (48 U.S.C. 1424(b), 1612(a), and 1694a(a)) and the Assimilation Clause (48 U.S.C. 1424-4, 1614(b), and 1694(c)).

28 U.S.C. 2409a concerns real property quiet title actions against the United States, and in subsection (g) imposes a 12-year statute of limitations "except for an action brought by a State". Subsections (h) through (k) contains further provisions concerning "State" actions. It would appear that the term "State" would include the Virgin Islands, Guam, and the Northern Marianas under either the Jurisdiction Clause (48 U.S.C. 1424(b), 1612(a) and 1694a(a)) or the Assimilation Clause (48 U.S.C. 1424-4, 1614(b), and 1694(c)). But in informal and tentative comments on this memorandum, a Justice Department commentator has termed this result "highly questionable", stating:

When section 2409a was enacted in 1972, the 12-year limitation provision did not contain an exception in favor of States. In Block v. North Dakota, 461 U.S. 273 (1983), the Court held that the powers of Congress to attach conditions to a waiver

of sovereign immunity prevails over the general rule that, as an incident of State sovereignty, a statute of limitations does not run against the several States. In view of the dissatisfaction of mainly the Western States with this ruling, Congress amended section 2409a in 1986, 100 Stat. 3351, so as to provide expressly that the 12-year statute of limitations does not run against the States. The legislative history tends to indicate that Congress was thinking only of the traditional immunity of States from the statute of limitation. No mention was made of the case of Government of Guam v. United States, 744 F.2d 699 (9th Cir. 1984), a quiet title action brought by the Government of Guam, in which the 12-year statute of limitation of section 2409a was held to run against the territory of Guam. Moreover, although the territories, as quasi-sovereigns, share the States' sovereign immunity from suit (Puerto Rico v. Shell Co., 302 U.S. 253, 262 (1937)), preliminary research has not disclosed any ruling to the effect that the territories are equally immune from the operation of the statute of limitations. These considerations would militate against an interpretation of the term "State" in section 2409a as including a territory. On the other hand, the 12-year limitation of section 2409a goes to the jurisdiction of the court (Block v. North Dakota, 461 U.S. 273, 292 (1983)). Hence, if the term "State" in that section includes the States but not the territories, the district courts in the States would have jurisdiction in quiet title actions relating to land within the district brought by a State, even if the claim occurred more than 12 years before the action is filed, while a District Court located in a territory would not have jurisdiction in an analogous case. This result would be inconsistent with the

jurisdiction clause, pursuant to which the districts courts of Guam and the Virgin Islands and for the Northern Mariana Islands have the jurisdiction of a District Court of the United States, i.e., of a district court located in a State. It would appear that this uncertainty should be clarified.

In these circumstances, an amendment to 28 U.S.C. 2409a to make clear that "State" includes the Virgin Islands, Guam, and the Northern Marianas should be obtained.

It should be noted that subsection (1) of 28 U.S.C. 2409a defines "tide or submerged lands" as the term is defined in the Submerged Lands Act. That Act does not now apply to the Northern Marianas (see Memorandum No. 43-1), but it is recommended that appropriate legislation be enacted for the Northern Marianas (see Memorandum No. 48-4).

28 U.S.C. 2410 grants the consent of the United States to be sued in certain actions in "State" courts relating to real or personal property on which the U.S. has or claims a mortgage or other lien. The local territorial courts are probably "State" courts for purposes of this section, given the Relations Clause, but to avoid argument it would be well to define the term to include the Virgin Islands, Guam, and the Northern Marianas.

28 U.S.C. 2413 provides that a writ of execution for the use of the United States may be executed in any State or "Territory". The upper case "Territory" would include the "territories", given the clear purpose of the 1984 Territorial Court Act.

28 U.S.C. 2414 provides for the method of payment of judgments against the United States by Federal courts and by "a State or foreign court". The term "State" would include a local territorial court, because the Congress unquestionably

intended to cover the method of satisfying judgments by all non-Federal courts.

28 U.S.C. 2671-2680 contains the Federal Tort Claims Act, and at section 2679(d) provides for the removal from a "State" court to a Federal district court of certain tort actions. The term "State" court would include a local territorial court, in light of the Relations Clause (48 U.S.C. 1424-2, 1613, and 1694(c)).

At 28 U.S.C. 2680(k) there is an exclusion from the Federal Tort Claims Act of any "claim arising in a foreign country". This exclusion presents no problem, and never has, with respect to the Virgin Islands, Guam or Samoa, none of which could be viewed for this purpose as "foreign". But it did result in a series of cases holding that the Trust Territory was "foreign" (e.g., Callas v. U.S., 253 F.2d 838 (1958), cert. den., 357 U.S. 936 (1958)), and thus claims arising in the Northern Marianas, after its Covenant became largely effective but prior to termination of the Trusteeship Agreement, may also have been excluded. The matter was corrected at the recommendation of the Northern Marianas Federal Laws Commission by enactment of legislation in 1982 stating that the Northern Marianas was not "foreign" for Tort Claims Act purposes, with respect to claims arising after October 1980 (Pub. L. 97-357). The provision is now unnecessary and without effect, in light of termination of the Trusteeship in November 1986, because the Northern Marianas, like the other territories, is now clearly not "foreign".

28 U.S.C. 2901-2906 concern the civil commitment and rehabilitation of narcotic addicts. Excluded from the "eligible individuals" who qualify for special treatment is an individual who has been "civilly committed under [these sections], under the District of Columbia Code, or any State proceeding because of narcotic addiction on three or more occasions" (28 U.S.C. 2901(g)(5)). The term "State" when used here would necessarily be construed to include the territories, in light of the earlier definition of "felony" at 28 U.S.C. 2901(e), which makes express reference to "any possession or territory of the United States." Congress' intent was clearly to comprehend all areas for which it has

authority to legislate. While the title of 28 U.S.C. 2905 refers to the Surgeon General's use of "Federal, State, and private facilities", the provision itself refers only to "any public or private agency", so that agencies of the territories would be comprehended.

The Appendix to Title 28 contains several statutes, one of which is of possible interest in the territories: The Dispute Resolution Act, enacted in 1980, provides for grants of financial assistance to applicants in the "States" for the establishment or improvement of dispute resolution mechanisms. The "States" include the "territories and possessions" under section 3(7), so the territories that are the subjects of this study are all eligible. (Although the law was enacted after January 9, 1978, so that section 502(a)(2)n of the Northern Marianas Covenant does not serve to extend it there, it is a law applicable equally to the States and the territories, so section 105 of the Covenant makes it applicable to the Northern Marianas.)

Conclusion: Several sections of Title 28 are of arguable application to the territories or their local courts and these ought to be amended to eliminate doubt. They are listed in the Appendix to this Memorandum, along with other sections discussed above that do not appear to require modification. The rationale for the proposed amendment is explained at the appropriate point above.

Federal agency comments: Comments were requested from the Department of Justice, which provided extensive and detailed--and extremely helpful--comments in writing. All are reflected above. The Justice Department commentator sought to make particularly clear that the comments provided are and were informal and unofficial, as well as tentative, and that point is emphasized here.

Memorandum No. 28-1
Appendix

Summary

Sections of Title 28 discussed in Part (4) of Memorandum No. 28-1, showing recommendations for clarifying legislation.

157	- Further legislation unnecessary
332(e)(8)	- Further legislation unnecessary
333	- Further legislation unnecessary
517	- Further legislation unnecessary
524(c)(1)(A)	- Clarifying legislation desirable
526	- Further legislation unnecessary
529(3)	- Further legislation unnecessary
534(a)(4)	- Further legislation unnecessary
545,561	- Further legislation unnecessary
570	- Further legislation unnecessary
610	- Further legislation unnecessary
631(a)	- Further legislation unnecessary
631(b)	- Clarifying legislation desirable
959	- Further legislation unnecessary
960	- Clarifying legislation desirable
994,995	- Clarifying legislation desirable
1251	- Further legislation unnecessary
1252	- Further legislation unnecessary
1254	- Further legislation unnecessary
1257	- Further legislation unnecessary
1291	- Further legislation unnecessary
1292	- Further legislation unnecessary
1294	- Further legislation unnecessary
1295	- Further legislation unnecessary
1332	- Further legislation unnecessary
1333	- Further legislation unnecessary
1334	- Further legislation unnecessary
1341	- Further legislation unnecessary
1342	- Further legislation unnecessary
1343	- Further legislation unnecessary

Memorandum No. 28-1
Appendix (cont.)

1344	- Clarifying legislation desirable
1346	- Further legislation unnecessary
1348	- Further legislation unnecessary
1352	- Further legislation unnecessary
1354	- Further legislation unnecessary
1355	- Further legislation unnecessary
1356	- Further legislation unnecessary
1357	- Further legislation unnecessary
1365	- Clarifying legislation desirable
1391-1412	- Further legislation unnecessary
1441-1452	- Further legislation unnecessary
1602-1611	- Clarifying legislation desirable
1652	- Clarifying legislation desirable
1655	- Further legislation unnecessary
1861-1869	- Clarifying legislation desirable
1961, 1962, 1964	- Further legislation unnecessary
2002	- Further legislation unnecessary
2005-2007	- Further legislation unnecessary
2101(d), 2102, 2104	- Further legislation unnecessary
2241-2255	- Further legislation unnecessary
2283	- Further legislation unnecessary
2284	- Clarifying legislation desirable
2361	- Further legislation unnecessary
2403(b)	- Further legislation unnecessary
2409a	- Clarifying legislation desirable
2410	- Clarifying legislation desirable
2413	- Further legislation unnecessary
2414	- Further legislation unnecessary
2671-2680	- Further legislation unnecessary
2901-2906	- Further legislation unnecessary
Appendix	- Further legislation unnecessary

Title 29 - LABOR

- Contains nothing of substantial interest to the territories or the Trust Territory.
- * Contains matters of particular interest to the territories and the Trust Territory, but no legislative recommendations.
- ** Contains recommendations for changes in the law.
- (**) Contains recommendations for changes in the law, but the need for them is not urgent.

<u>Memorandum Number</u>	<u>Subject</u>	<u>29 U.S.C. sections</u>
29-1	- (a) Labor Statistics - (b) Women's Bureau	1-9b 11-14
29-2	(**) Federal Employment Service (The Wagner-Peyser Act)	49-491-1
29-3	- (a) Apprentice Labor * (b) Labor Disputes; Mediation and Injunctive Relief (Clayton Act, section 20) * (c) Jurisdiction of Courts in Matters Affecting Employer and Employee (Norris-LaGuardia Act)	50-50b 52-53 101-115
29-4	(**) Labor Management Relations (Labor Management Relations Act of 1947)	141-187
29-5	* Fair Labor Standards Act	201-219
29-6	- (a) Portal to Portal Pay (The Portal-to-Portal Act of 1947) * (b) The Labor Management Reporting and Disclosure Act of 1959 - (c) Department of Labor - (d) Age Discrimination in Employment	252-262 401-531 551-564 621-634
29-7	* Occupational Safety and Health (The Occupational Safety and Health Act of 1970)	651-678

29-8	* (a) Vocational Rehabilitation and other Rehabilitation Services (The Rehabilitation Act of 1973)	701-7961
	- (b) Employee Retirement Income Security Program (ERISA)	1001-1461
	* (c) Job Training Partnership (The Job Training Partnership Act, 1982)	1501-1781
	- (d) Migratory and Seasonal Agricul- tural Worker Protection	1801-1872

Subject: (a) Labor Statistics
Title 29, Chapter 1 (29 U.S.C. 1-9b)

(b) Women's Bureau
Title 29, Chapter 2 (29 U.S.C. 11-14)

Comment: The laws considered herein require no modification to meet the needs of the territories or the Trust Territory.

Discussion: (a) Chapter 1, entitled Labor Statistics, contains the basic authority of the Bureau of Labor Statistics of the Department of Labor. The Bureau is given the duty "to acquire and diffuse among the people of the United States useful information on subjects connected with labor, in the most general and comprehensive sense of that word . . .", including labor's relation to capital, hours of labor, earnings, and the means of promoting for working men and women "their material, social, intellectual, and moral prosperity" (29 U.S.C. 1). The statute specifies certain reports and the frequency of their publication, and authorizes others.

There is little question that the basic authority of the Bureau of Labor Statistics extends to all of the territories, i.e., to the Virgin Islands, Guam, Samoa, and the Northern Marianas. The Chapter contains some references to the "States", undefined (29 U.S.C. 2, 5), but these are almost certainly not limiting, for they appear in sections that use broader language as well: "throughout the United States" (29 U.S.C. 5) and "State and foreign labor reports" (29 U.S.C. 5). With the informal concurrence of the Labor Department in 1951, the Commission on the Application of Federal Laws to Guam concluded that the Bureau of Labor Statistics then had authority to collect data in Guam (H. Doc. No. 212, 82d Cong., p. 19). (The Commission on the Application of Federal Laws to the Virgin Islands reached a contrary conclusion in 1956. That Commission categorized 29 U.S.C. 1-9b as constituting a law "now inapplicable which should be made applicable" to the Virgin Islands (Committee Print No. 7, House Committee on Interior and Insular Affairs, 84th Congress, pp. 10, 11 (1956)), but its reasons for this categorization have been lost in history. The report's listing probably represents an error.) There have been no changes in the law since 1951 that

would affect the Guam Commission's conclusion. The Northern Marianas would be covered by operation of section 502 of the Northern Marianas Covenant. Nothing in the statute warrants distinguishing one territory from any other, so American Samoa (and indeed, the Virgin Islands) are also within the BLS authority.

The BLS authority is also sufficient to comprehend the Trust Territory, as well as its foreseen successors under the Compact, the "Freely Associated States". The 1895 statute appearing at 29 U.S.C. 5 permits the Commissioner of BLS to prepare and publish statistics concerning "the condition of labor in this and other countries", and the Trust Territory can reasonably be regarded as an "other country" (because the Trust Territory is generally viewed as foreign under U.S. law, unless the Federal law in question expressly applies to it, thus making it in effect "domestic" for the purposes of that law (Gale v. Andrus, 643 F.2d 826 (1980)), and the foreseen Freely Associated States will be even more foreign.)

A particular provision authorizing the collection of labor statistics in Hawaii, contained in the Hawaii Organic of 1900 (formerly codified at 29 U.S.C. 7, but now repealed), should not be read to suggest that the Bureau of Labor Statistics requires explicit authority as to each territory. That Hawaii provision contained particular reporting requirements (e.g., "as to nativity" of employees in industries in the Territory), and can thus be viewed as having conferred unusual authority on BLS as to this then newly-acquired territory.

(b) The law pertaining to the Women's Bureau (29 U.S.C. 11-14), a component of the Department of Labor, contains no geographical limitations--nor any statement of geographic scope. It imposes upon the Bureau the duty "to formulate standards and policies which shall promote the welfare of wage-earning women, improve their working conditions, increase their efficiency, and advance their opportunities for profitable employment" (29 U.S.C. 13). Both the Guam and Virgin Islands Commission Reports, cited above, stated that the statute applies to those areas (p. 19, p. 20, respectively), and those conclusions appear as valid today.

That conclusion would apply equally to Samoa and the Northern Marianas, and almost certainly to the Trust Territory as well.

Conclusion: The laws considered herein require no change to accommodate the needs of the territories or the Trust Territory.

Federal agency comments: Comments were invited from the Department of Labor and the Department of Justice. All comments received have been reflected above.

Memorandum No. 29-2
May 1984
Revised February 1985

Subject: Federal Employment Service
(The Wagner-Peyser Act of 1933, as amended)
Title 29, Chapter 4B (29 U.S.C. 49-491-1)

Purpose: The Wagner-Peyser Act establishes the United States Employment Service, a component of the Department of Labor, which oversees a network of about 2500 State and territorial employment offices that have been established by State and territorial law, and which provides Federal funds for such public employment services if they meet Federal standards.

Territorial Application: The Wagner-Peyser Act now applies to the Virgin Islands, Guam, and the Northern Marianas. It does not apply to American Samoa or to the Trust Territory (except for the Northern Marianas). Some of the principal statutes related to it, however, apply differently:

-- Title III of the Social Security Act (42 U.S.C. 501 et seq.) and the Federal Unemployment Tax Act (26 U.S.C. 3301 et seq.) apply to the Virgin Islands but not to Guam, the Northern Marianas, Samoa, or the Trust Territory. (See Memoranda Nos. 26-3(c) and 42-3.)

-- The Immigration and Nationality Act, and particularly the provision concerning alien workers temporarily admitted to the United States (8 U.S.C. 1101(a)(15)(H)(ii), 1101(a)(36) and (38)), apply generally to the Virgin Islands and Guam, but not to the other areas here in question. (See Memorandum No. 8-1.)

-- The Job Training Partnership Act (29 U.S.C. 1501 et seq.), which generally amended the Wagner-Peyser Act in 1982, among other things in order to provide coordination between State and territorial employment service programs and training programs, applies to all of the areas here in question, i.e., to Guam, the Virgin Islands, Samoa, the Northern Marianas, and the Trust Territory. (See Memorandum No. 29-8(c).)

Recommendation: The application of the Wagner-Peyser Act to the Virgin Islands, Guam, and the Northern Marianas is appropriate at this time, but a technical amendment would be desirable for the Northern Marianas.

Discussion: The substance of the Wagner-Peyser Act. The Act was passed in 1933, in the depth of the Depression, in order "to promote the establishment and maintenance of a national system of public employment offices" (29 U.S.C. 49). The public employment offices are created by State or territorial law and are administered by State or territorial (not Federal) officers, but they are overseen and assisted by the United States Employment Service (USES). (During World War II they became a Federal responsibility, but following the war they were returned to the States.) The Act was extended to the Virgin Islands (and Puerto Rico) in 1950, and to Guam in 1956 (29 U.S.C. 49a(5))--with the latter extension enacted pursuant to a recommendation of the 1950 Commission on the Application of Federal Laws to Guam. By operation of section 502(a)(1) or (2) of the Northern Marianas Covenant, the Act is now applicable to the Northern Marianas (a conclusion discussed below).

A State or territory that seeks to benefit from the law must have an employment service that complies with a variety of statutory requirements and must obtain the approval of the Secretary of Labor (29 U.S.C. 49g). Among other things, plans must be submitted that have been developed in cooperation with private industry councils and the job training coordinating councils created under the Job Training Partnership Act (29 U.S.C. 49g(b)); satisfactory fiscal control and accounting procedures must be adopted (29 U.S.C. 49h(a)); various reports must be filed (29 U.S.C. 49i).

Employment services that qualify are entitled to Federal funds. The States are each allotted an amount based on a formula that takes into account the number of people within the State who are in the civilian labor force, the State's total population, its number of unemployed, and the total number of unemployed throughout all the States (plus Puerto Rico, the Virgin Islands, Guam, and at least prospectively, the Northern Marianas) (29 U.S.C. 49e(b)). The formula does

not apply, however, to Guam and the Virgin Islands. They receive instead "an amount which, in relation to the total amount available for the fiscal year, is equal to the allotment percentage which each received of amounts available in fiscal year 1983" (29 U.S.C. 49e(a)). But there are two caveats: No State or territory can receive less than 90% of what it received in the preceding year (29 U.S.C. 49e(b)(2)), and none can receive less than 0.28 percent of the total amount available for the year in question (29 U.S.C. 49e(b)(3)). The Northern Marianas received no funds under the program in fiscal year 1983, so if it were to seek them, the 0.28 percent provision would appear to apply.

(Although the figures are somewhat misleading, it may be useful to note that the fiscal year 1983 report on Federal Expenditures by State, prepared by the Bureau of the Census, shows that for "State unemployment insurance and employment service operations" Guam that year received \$353,000, and the Virgin Islands, \$2,711,000. There is no breakdown of the latter figures as to the two components, but the disparity undoubtedly results from the Virgin Islands' participation in the Federal unemployment compensation program, a program not applicable to Guam.)

Unemployment compensation. A major function of State and territorial public employment service offices is the payment of unemployment compensation to those in the pertinent jurisdiction that qualify for it, under State or territorial law. The unemployment compensation program is the creature of Title III of the Social Security Act (42 U.S.C. 501 et seq.) and of the Federal Unemployment Tax Act (26 U.S.C. 3301 et seq.), with payments under the former being designed to encourage the States and certain territories to create effective unemployment compensation programs and to administer them according to Federal standards, and with the latter imposing taxes on employers within the States and certain territories that result in Federal payments to support State and territorial unemployment compensation programs. (See Memoranda Nos. 26-3(c) and 42-3 for a more detailed discussion of these laws.) Title III of the Social Security Act applies to the Virgin Islands, but not to Guam, Samoa, the Northern Marianas, or the Trust Territory (42 U.S.C. 1301(a)(1)), and the Federal Unemployment Tax Act has the same application (26

U.S.C. 3306(j)). These two laws were extended to the Virgin Islands in 1976, at the request of the Government of the Virgin Islands (1976 U.S. Code Cong. and Admin. News 5997, 6007-6008).

The Wagner-Peyser Act provides that in order to receive Federal funds for its employment service, a State or territory must have an unemployment compensation law that has been approved by the Secretary of Labor under the Federal Unemployment Tax Act (29 U.S.C. 49d(b)). But because that tax law does not apply to it, Guam is expressly exempt from the requirement (i.e., "except in the case of Guam", the State or territory must have such a Secretarially-approved law (29 U.S.C. 49d(b)(1))). Whether such an explicit exemption is needed for the Northern Marianas (the only other area here relevant) is discussed below.

As the above discussion indicates, it is possible for the Wagner-Peyser Act to apply to--and the attendant public employment services to exist in--jurisdictions to which the Federal unemployment compensation program does not apply. That was the case in the Virgin Islands from 1950 to 1976, and has been the case in Guam since 1956. The reverse is not true, for public employment service agencies that are affiliated with the USES are as a practical matter essential to the administration of the Federally-aided unemployment compensation program.

Application to the Northern Marianas. Either paragraph (1) or paragraph (2) of section 502(a) of the Northern Marianas Covenant causes the Wagner-Peyser Act to apply to the Northern Marianas. These paragraphs provide in pertinent part that, effective January 9, 1978, the following Federal laws apply to the Northern Marianas:

(1) those laws which provide federal services and financial assistance programs . . . as they apply to Guam . . .

(2) those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States . . . (90 Stat. 263, 268).

Because it applies, in the manner described in (2), to both Guam and the "several States", the Wagner-Peyser Act could apply to the Northern Marianas pursuant to paragraph (2) above. But if that were done, then an amendment to the Wagner-Peyser Act would be necessary for the Northern Marianas because (a) the Wagner-Peyser Act requires, as a condition precedent to a grant of Federal financial assistance, that the recipient have an unemployment compensation law approved by the Secretary of Labor under the Federal Unemployment Tax Act (29 U.S.C. 49d(d)), (b) such Tax Act does not apply to the Northern Marianas, and (c) the statutory exemption from that requirement runs explicitly to Guam alone.

If, however, the conclusion is reached that the Wagner-Peyser Act applies to the Northern Marianas pursuant to paragraph (1) of section 502(a) of the Covenant, then the Act applies to the Northern Marianas in the same manner as it applies to Guam--thereby, in effect, expanding the Tax Act exemption at 29 U.S.C. 49d(b)(1) to include the Northern Marianas. On that basis, the Northern Marianas could obtain Federal financial assistance for its employment agency now, without a Federal legislation change. That statutory construction seems reasonable, because the Wagner-Peyser Act does "provide federal services and financial assistance".

So, the Northern Marianas could seek Wagner-Peyser funds now, without further legislation from the Congress. The Northern Marianas has created a public employment service for the Commonwealth. (The question whether that service could meet Wagner-Peyser Act standards in order to qualify for Federal funds is beyond the scope of this memorandum, but if it were to develop that the Northern Marianas law is inadequate, any deficiency could clearly be corrected without Federal legislation.) It would, however, doubtless be desirable if the Federal statute were modified to reflect the inclusion of

the Northern Marianas--by expanding the definition of "State" at 49 U.S.C. 49a(5), and by adding the Northern Marianas to the Guam exemption at 49 U.S.C. 49d(b)(1). Such amendments should be viewed not as changing the current state of the law, but rather as making explicit that which is now implicit, under section 502(a)(1) of the Covenant.

Certification of alien workers. A further function of the USES, performed pursuant to the Wagner-Peyser Act and other statutes, is the certification of the need for the entry into the United States of aliens to perform temporary work. (These workers are often referred to as "H-2s", because of the section of the Immigration and Nationality Act of 1952 that defines them (8 U.S.C. 1101(a)(15)(H)(ii).) A problem of consequence in Guam arose concerning this matter, and while it did not involve any statutory problem (and so is not strictly relevant to this study), and while it has recently been resolved to Guam's satisfaction, some mention of it may be of value in the interest of history--and its always possible repetition.

Among the territories, the Virgin Islands and Guam alone are part of the "United States" for purposes of the Immigration and Nationality Act (8 U.S.C. 1101(a)(36), (38)). Hence, Samoa, the Northern Marianas, and the Trust Territory control immigration into their respective areas, under their own laws. (Some provisions of the Immigration and Nationality Act apply to the Northern Marianas under section 506 of the Covenant, but none are material for purposes of the immediate discussion.)

There have been brought to Guam over recent decades many thousands of alien workers from various parts of Asia, to perform services--principally construction--for which local residents or other U.S. citizens were unavailable. Until September 1977, the territory of Guam's own employment service was authorized by the U.S. Immigration and Naturalization Service to determine whether alien workers were needed in Guam, a determination required by the Immigration and Nationality Act prior to the entry of such workers. Perhaps because those determinations were believed to have been too generous in favor of importing aliens, but unquestionably

because of a belief that if the wages and benefits to be paid were raised, then local people in Guam and U.S. citizens from Hawaii or the mainland would be attracted by the jobs, the Labor Department in 1977 terminated the certification authority Guam had had and placed it directly in the U.S. Department of Labor itself. At the same time, under the authority of the Wagner-Peyser Act (as cited in the Federal Register), the Labor Department required the payment in Guam of wages at an "adverse effect rate", with particular rates specified, and defined as the rate determined by the head of USES to be at a level "so that the wages of similarly employed U.S. workers will not be adversely affected" (20 CFR 655.101, April 1, 1983 ed.).

Guam immediately objected, and its objections continued and grew, based principally on arguments concerning (1) the time required to obtain the certification of need, reportedly often as much as 6 months following the employer's application, and (2) the alleged failure of the adverse effect wage rates to produce the hoped-for results. Guam residents, with minimal exceptions, did not seek the jobs in question; employers' costs, principally in construction wages, rose substantially; mainland or Hawaii workers were not attracted to Guam employment; and a substantial part of the increased wages were sent home, to wherever the alien laborer had come from. In the late 1970's and early 1980's, Guam's construction industry did suffer a precipitous decline. If not caused by the procedures instituted in 1977, those procedures almost certainly contributed toward it. In May 1981, in a proceeding in the Federal District Court for the Northern District of California (Guam Contractors Association v. U.S. Department of Labor, Civil No. C-79-3464-SW), the Secretary of Labor was held to have exceeded his authority as to the Adverse Effect Wage Rates and was ordered to establish new rates using different standards. Among other things, he was directed to take into account not "wages paid in twenty-three mainland cities", but instead wages paid "in the labor market in which Guam is located" (unreported Memorandum and Order, May 20, 1981).

After several years of efforts by the Guam Contractors Association, the Government of Guam, the Department of the Interior, and others, the matter was resolved in April 1984

when the Immigration and Naturalization Service agreed to return to the Governor of Guam the authority to certify the need for alien workers--with the stated rationale that the change "provides for closer control and monitoring of the certification process and will assure that local employment statistics and other information will be available and used in the certification process" (49 Fed. Reg. 15182, April 18, 1984). At the same time, adverse-effect wage rates were frozen at the 1980 level, pending the establishment by the Governor of Guam of "systematic methods for determining the prevailing wage rates and working conditions for individual occupations of Guam . . ." (8 CFR 214.2(h)(3)(iii)).

The pertinent parties appear to be satisfied, for the present.

Extension of the Act to Samoa and/or the Trust Territory. The two areas that are subjects of this study to which the Wagner-Peyser Act does not apply appear to be areas to which it need not do so. Neither Samoa nor the Trust Territory provide public employment services now. It is unlikely that the Trust Territory components would move toward creating an employment agency in the interval, probably brief, before the Compact of Free Association becomes effective, following which the kind of Federal assistance and funds afforded by the Wagner-Peyser Act would be incompatible with Compact terms. As for Samoa, the relatively few jobs that now exist in the private sector suggest that Samoa is not yet ripe for the kind of employment service agency that the Wagner-Peyser Act contemplates. When it becomes so, it will be time enough to extend the Act to that territory.

Conclusion: The Wagner-Peyser Act requires no change to meet territorial needs, but amendments to those sections codified at 29 U.S.C. 49a(5) and 49d(b)(1) would be desirable, to fortify the Act's application to the Northern Marianas.

Federal agency comments: Comments were invited from the Departments of Justice, Labor, and the Interior. All comments received have been reflected above.

- Subject: (a) Apprentice Labor
Title 29, Chapter 4C (29 U.S.C. 50-50b)
- (b) Labor Disputes; Mediation and Injunctive Relief
(Clayton Act, section 20)
Title 29, Chapter 5 (29 U.S.C. 52-53)
- (c) Jurisdiction of Courts in Matters Affecting Employer
and Employee
The Norris-LaGuardia Act
Title 29, Chapter 6 (29 U.S.C. 101-115)

Comment: The Apprentice Labor Program (Chapter 4C of Title 29) appears to apply to all of the territories. The constraints imposed upon courts by section 20 of the Clayton Act (Chapter 5) and by the Norris-LaGuardia Act (Chapter 6) are probably applicable to the District Courts for the Virgin Islands, Guam, and the Northern Marianas. They are not applicable to courts in Samoa or the Trust Territory.

Discussion: (a) The Apprentice Labor program (29 U.S.C. 50-50b), under the National Apprenticeship Act enacted in 1937, directs the Secretary of Labor to safeguard the welfare of apprentice laborers by, among other things, cooperating with "State" agencies engaged in the formulation and promotion of standards of apprenticeship. The Act was amended in 1973 to provide that the term "State" includes the District of Columbia. That amendment would suggest that other non-State areas, not expressly named, are not comprehended by the law, but the contrary conclusion seems more reasonable. First, the 1973 amendment was contained in the District of Columbia Self-Government and Governmental Reorganization Act of that year (P.L. 93-198, 87 Stat. 774, 784), a statute that shifted a number of responsibilities between Federal and District of Columbia officers and that was understandably confined to subjects touching the District of Columbia alone. Second, both the Guam (1951) and Virgin Islands (1956) Commissions on the Application of Federal laws to those territories concluded that the National Apprenticeship Act applied to each of them. (Report of the Guam Commission, H. Doc. 212, 82d Cong., p. 19; Report of the Virgin Islands Commission, House Interior Committee Print No. 7, 84th Cong., p. 21.) The former had the

unofficial concurrence of the Labor Department's Solicitor's Office at the time, on the ground that the statute contained no geographical limitations.

The matter is not entirely academic, because at least the Virgin Islands has an Apprenticeship and Training Division in its own Department of Labor. There should be no statutory hindrance to cooperation between the U.S. Department of Labor and that territorial unit, nor with apprenticeship agencies that may be created in other territories to promote standards of apprenticeship in their areas.

(b) These sections, concerning Labor Disputes and Injunctive Relief (29 U.S.C. 52-53) are derived from the Clayton Act, enacted in 1914. They impose limitations on the powers of "any court of the United States", providing that such a court cannot issue a restraining order or an injunction in certain labor disputes, unless irreparable injury to property would otherwise occur (29 U.S.C. 52). A hint as to geographical application can be found at 29 U.S.C. 53, where the term "person" is defined to include a corporation or association functioning under the laws of the U.S., "the laws of any of the Territories, the laws of any State, or the laws of any foreign country".

Because the term "court of the United States", without more, has historically referred to a court created under Article III of the U.S. Constitution (i.e., a "constitutional court"), to the exclusion of a court created under Articles II or IV (i.e., a "legislative court"), there may be a little room to argue that the United States District Courts in the Virgin Islands, Guam, and the Northern Marianas are not comprehended by the term. But because the historic distinction has grown blurry (e.g., the United States District Court for Puerto Rico is defined as a "court of the United States" for purposes of the Judicial Code (28 U.S.C. 119, 451)), and because the U.S. District Courts for the Virgin Islands, Guam, and the Northern Marianas have each been given "the jurisdiction of a district court of the United States" (48 U.S.C. 1612, 1424(a), and 1694a(a), respectively), it seems correct to conclude that those three courts are subject to the constraints set forth at 29 U.S.C. 52. Although recognizing that the issue was not

free from doubt, the Commission on the Application of Federal laws to Guam reached that conclusion in 1951 (H. Doc. 212, 82d Cong., p. 20), as did the Virgin Islands Commission thereafter (Comm. Print No. 7, House Interior Committee, 84th Cong., p. 21), with both concluding that 29 U.S.C. 52 applied to their respective District Courts. The definition at 29 U.S.C. 53 is conducive to this result, suggesting a Congressional intent to provide for broad application.

Courts in Samoa and the Trust Territory, on the other hand, are clearly not "courts of the United States", but these 1914 provisions need not now apply to them, given the absence in Samoa of the kind of labor disputes to which the statute was directed, and--although there have been organized labor disputes of some intensity in the Trust Territory--given the quickening motion at this time toward trusteeship termination.

The issue of constitutional versus legislative courts is discussed further below, at (c), in connection with the Norris-LaGuardia Act (29 U.S.C. 101-115).

(c) Chapter 6 of Title 29 contains the Norris-LaGuardia Act, enacted in 1932, a further anti-injunction law restricting the Jurisdiction of Courts in Matters Affecting Employer and Employee (29 U.S.C. 101-115). Like section 20 of the Clayton Act, considered at (b) above, the Norris-LaGuardia Act restricts the jurisdiction of a "court of the United States" in cases involving certain labor disputes. The Act has been described as having as its fundamental purpose the protection of workers to organize and to bargain collectively, and to exclude the Federal courts from interceding, so as to achieve with greater certainty that "which Congress thought it had formulated" by enacting section 20 of the Clayton Act some 18 years earlier (AFL v. Panama S.S. Co., 362 U.S. 365, 370 (1960)). A "court of the United States" cannot act to enforce a "yellow dog" contract, i.e., one in which either party agrees not to join a labor organization or an employer organization (29 U.S.C. 103); cannot issue a restraining order or enjoin persons from various specified activities, including refusing to perform work, becoming members of a labor organization, or assembling peaceably to organize to promote their interests in a labor dispute (29 U.S.C. 104); and cannot

issue an injunction in a case involving a labor dispute unless certain procedures are followed (29 U.S.C. 107, 109). A restraining order or an injunction cannot be issued unless the complainant has clean hands, and has already made "every reasonable effort to settle" the labor dispute by negotiation, mediation, or arbitration (29 U.S.C. 108).

The question whether the Norris-LaGuardia Act constrains the District Courts in the Virgin Islands, Guam, or the Northern Marianas has apparently not been judicially determined. The question is whether the term "court of the United States," as defined for purposes of the Norris-LaGuardia Act, includes those courts. For purposes of the Act, the term means

any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia. (29 U.S.C. 113(d))

Giving those words their customary meaning, the Federal District Courts in those three territories are covered, for in each case the jurisdiction of the court has been conferred or defined by Act of Congress--48 U.S.C. 1612 in the case of the Virgin Islands, 48 U.S.C. 1424(a) in Guam, and 48 U.S.C. 1694a(a) in the Northern Marianas.

That is almost certainly the correct result, but because it is not wholly free from doubt, some further discussion may be warranted. The term "court of the United States" has long been viewed as a term of art, describing courts created under Article III of the Constitution (known as "constitutional courts"), and limited to the Supreme Court, the Courts of Appeals, and the U.S. District Courts in the States and, for some purposes, the District of Columbia. (American Insurance Co. v. Canter, 26 U.S. 511, 545 (1828); Mookini v. U.S., 303 U.S. 201 (1938)). Courts created by Congress for the territories under Article IV of the Constitution, and other special courts created by Congress under Article II, such as the United States Claims Court, have been viewed as "legislative courts". (The distinction, relating largely to

tenure and compensation of judges, is not of immediate relevance.)

That historic distinction, however, was not wholly reflected in the 1948 revision of the Judicial Code, which defined the United States District Courts for Hawaii and Puerto Rico--both of which were then unarguably territories--as "courts of the United States". The U.S. District Court for Puerto Rico continues to be so defined today (28 U.S.C. 119, 451). But in two cases stemming from the Territory of Hawaii, the Court of Appeals of the Ninth Circuit discussed at some length the distinction between constitutional and legislative courts, and then held that lower courts in Hawaii (not the U.S. District Court, created by the Congress, but courts of the Territory, some of which had been created by the Congress in the Hawaiian Organic Act of 1900, with others created by the Territorial Legislature acting pursuant to the Organic Act), were not constrained by the Norris-LaGuardia Act. These holdings were not exceptional, because State courts have often been held to be free of the restrictions of the Act, and territorial courts in the Territory of Hawaii were roughly analogous to courts created by the States. But the courts' discussion gives pause. In International Longshoremen's and Warehousemen's Union (CIO) v. Wirtz (170 F.2d 183 (1948), cert. denied 336 U.S. 919), the court made much of the distinction between constitutional and legislative courts, and quoted Congressman LaGuardia as stating that the Act to which he gave his name was intended to apply to Article III, constitutional courts only. The court then held that the Norris-LaGuardia Act applies only to Article III courts, and thus not to the Circuit Court of the Territory of Hawaii (even though that court had been constituted by the Congress in the Hawaiian Organic Act). Similarly, in Alesna v. Rice (172 F.2d 176 (1949), cert. denied 338 U.S. 814), again it was held that the Act did not limit the equity jurisdiction of a lower Hawaii territorial court. No court, it appears, was called upon to decide the application of the Norris-LaGuardia Act to the U.S. District Court for the Territory of Hawaii.

(It should be observed in passing that the U.S. District Courts in the Virgin Islands, Guam, and the Northern Marianas Islands are not entirely analogous to those in Puerto Rico or in the former Territory of Hawaii. Those in the three

territories have the jurisdiction of Federal District Courts, but they may also have jurisdiction in local matters as well. The U.S. District Court for Puerto Rico has, and the District Court for the Territory of Hawaii had, on the other hand, only Federal jurisdiction (because each of those areas was sufficiently populous to warrant separate local court systems, including a Supreme Court)--and those two District Courts were thus generally comparable to Federal District Courts in the States. Prior to Statehood, Alaska's U.S. District Court was comparable to the courts in Guam, the Virgin Islands, and the Northern Marianas today, in that it too had both Federal and local jurisdiction. Upon Statehood, Alaska's District Court for the first time became a "court of the United States" under the definition in the Judicial Code (28 U.S.C. 451 and 81A, the latter of which was added by the Alaska Statehood Act). The point is that even if the Norris-LaGuardia Act were to be held to constrain the United States District Court for Puerto Rico--a conclusion apparently not yet reported--that would not wholly cement the same conclusion as to the District Courts of the Virgin Islands, Guam, and the Northern Marianas, because they differ from the Puerto Rico court in light of their jurisdiction in non-Federal cases.)

The Commission on the Application of Federal laws to Guam concluded that the Norris-LaGuardia Act applied to the U.S. District Court of Guam (H. Doc. 212, 82d Cong., p. 20). It did so notwithstanding the considerations outlined in the preceding paragraphs--which had led its staff to conclude that the inapplication of the Act to Guam's District Court was probably the "most orthodox" view at that time (1951)--and notwithstanding the unwillingness of the Federal agency experts at that time in the Labor Department, the National Labor Relations Board, or the Justice Department, to express a view either way. Based on the Federal jurisdiction conferred by Congress on the District court of Guam, and on the fact that the Judicial Code had conferred upon some legislative courts (those in Hawaii and Puerto Rico) the status of "courts of the United States", the Guam Commission concluded that the Norris-LaGuardia Act applied to Guam and should continue to do so. The Virgin Islands Commission later (1956) reached the same conclusion as to the District Court of the Virgin Islands (Comm. Print No. 7, House Interior Committee, 84th Cong., p. 21).

Given the circumstances described, there seems no reason to depart from those conclusions. No helpful judicial decisions have lately been rendered. The Norris-LaGuardia Act, therefore, should be viewed as limiting the jurisdiction of the U.S. District Courts for the Virgin Islands, Guam, and the Northern Marianas.

The Act does not apply to courts in Samoa or the Trust Territory, for there is no basis for viewing those courts as courts of the United States. Nor, as in the case of section 20 of the Clayton Act ((b) above), is there a factual basis for extending these constraints now to the courts of those two areas.

Conclusion: The laws considered herein, while not free from some uncertainty as to geographical application, appear to be applicable to such off-shore areas as are appropriate for their subject matter, and do not require any legislative modification.

Federal agency comments: Comments were invited from the Department of Labor and the Department of Justice. All comments received have been reflected above.

Memorandum No. 29-4
June 1984
Revised March 1985

Subject: Labor-Management Relations
Including the Wagner Act (1935), the Labor Management Relations Act (1947), the Landrum-Griffin Act (1959), and the Labor Management Cooperation Act (1978)
Title 29, Chapter 7 (29 U.S.C. 141-187)

Purpose: To declare a general Congressional purpose and policy with respect to the avoidance of industrial strife and with respect to the rights of employers and employees (Subchapter I); to create and prescribe the authority and duties of the National Labor Relations Board (Subchapter II); to create the Federal Mediation and Conciliation Service in order to afford facilities for conciliation, mediation, and arbitration, and to provide a special procedure in the case of strikes or lock-outs that imperil the national health or safety, including the use of injunctions (Subchapter III); and to provide for certain lawsuits in district courts of the United States, by and against labor organizations (Subchapter IV).

Territorial Application: The National Labor Relations Act, contained in Subchapter II of this Chapter, applies to all of the territories--i.e., to the Virgin Islands, Guam, American Samoa, and the Northern Marianas. It does not apply to the Trust Territory. The Federal Mediation and Conciliation Service (Subchapter III) also has jurisdiction in those four territories, but its activities and the use of emergency procedures there are likely to be infrequent, given the level of economic activity in those areas. As for Federal District Court jurisdiction in suits by or against labor organizations (Subchapter IV), the district courts in the Virgin Islands, Guam, and the Northern Marianas would have such jurisdiction, but no court in Samoa or the Trust Territory would be affected by the statute.

Recommendation: Although these statutes contain some uncertainties and some deficiencies, particularly with respect to court jurisdiction and enforcement in American Samoa, no problem of real moment appears, so legislative modification is not necessary to meet the needs of the territories.

Discussion: The discussion that follows will consider each Subchapter in turn, summarizing first the substance of the Subchapter, and then giving consideration to its application to the territories.

Subchapter I - General Provisions (29 U.S.C. 141-144)

These few sections are without substantial significance for purposes of this study. The statement of Congressional purpose and policy--to avoid or minimize industrial strife, particularly when it would jeopardize the public health, safety, or interest, and to "prescribe the legitimate rights of both employees and employers" so as to "protect the rights of the public" (29 U.S.C. 141)--are probably coextensive with the reach of the pertinent laws. In most instances, discussed below, the territories are comprehended, but the Trust Territory is consistently excluded. The definitions adopted are derived from the National Labor Relations Act (29 U.S.C. 142), and the key definition of "commerce" is discussed below in connection with that Act.

Subchapter II - The National Labor Relations Act (29 U.S.C. 151-169)

The Wagner Act, as amended by the Taft-Hartley Act, and others, is intended to protect the right of employees to organize, to encourage collective bargaining between employer and employees, and to define and prevent unfair labor practices. To this end, the five-person National Labor Relations Board was established, the principal functions of which are to prevent unfair labor practices by employers and by labor organizations (29 U.S.C. 158, 160), and to conduct elections among employees in collective bargaining units to establish whether the employees choose to be represented by a particular labor organization (29 U.S.C. 159).

The constitutional justification for the Act is the power of the Congress to regulate interstate and foreign commerce, and the Board's jurisdiction in the States is accordingly confined to activities in or affecting interstate or foreign commerce. The key definition is thus the definition of "commerce" (29 U.S.C. 152(6)), a definition that has remained unchanged since

its original enactment in 1935 in the Wagner Act (49 Stat. 449, 450). No other definitions in the Labor Management Relations Act provide guidance as to geographical application, and no other provisions of the Act, excepting those few discussed below, are of assistance in determining application. The Act defines "commerce" as

trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country. (29 U.S.C. 152(c))

Neither "State" nor "Territory" is defined. The use of the term "Territory", without reference to "territories" or "possessions", is unremarkable, give the date of enactment (1935), because that tended to be the legislative style at the time.

That the term "Territories" includes "territories", however, for purposes of the National Labor Relations Act, has been clear since at least 1947. In that year the Court of Appeals for the First Circuit held in NLRB v. Gonzales Padin Co. (161 F.2d 353), that the National Labor Relations Board has jurisdiction in Puerto Rico--then clearly a "territory" and not a "Territory". The court cited Puerto Rico v. Shell Co. (302 U.S. 253 (1937)), in which the Supreme Court held that the term "Territory" in the Sherman Act included a "territory" because the Congress in enacting the Sherman Act had intended to legislate as broadly as its authority permitted. In enacting the National Labor Relations Act, the First Circuit held, the Congress also "intended to deal comprehensively with labor disputes affecting commerce" (at p. 355). The court also observed that in the case of the territories, the Congress is not limited to regulating interstate commerce under the Commerce Clause; in light of its power under Article

IV of the Constitution, it may also regulate intra-territorial commerce--as the Wagner act definition quoted above clearly does.

From this Court of Appeals decision in 1947, it necessarily follows that all of the territories here considered are also comprehended by the National Labor Relations Act and by the authority of the Board:

-- In 1964 in an Advisory Opinion concerning the Virgin Islands, the board stated that it has jurisdiction in that territory (148 NLRB 277).

-- The Board reached the same conclusion in 1965 with respect to Guam, relying in part on the 1951 conclusion of the Commission on the Application of Federal Laws to Guam that the Act applied there and should continue to do so (154 NLRB 34). The board also found helpful the language of 29 U.S.C. 164 (c)(1), discussed below.

-- The question of jurisdiction in American Samoa was twice before the Board, with the Board concluding in 1968 that it did not have jurisdiction there because Samoa was not (and is not) an "organized" territory, inasmuch as it did not have (and does not have) "even a rudimentary government established by Congress" (172 NLRB 1467). But there followed in 1972 the Supreme Court's decision in U.S. v. Standard Oil of California (404 U.S. 558), in which the Court concluded that the Sherman Act applies to American Samoa on the basis of the same rationale as had been found earlier to support its application to Puerto Rico (Puerto Rico v. Shell Co., *supra*). For that reason, the Labor Board in 1974 reversed its 1968 decision, stating that:

. . . the Board is convinced that this holding of the Supreme Court is equally applicable to the word "Territory" as used in Section 2(6)[29 U.S.C. 152(6)] of the Act, for it is clear that in regulating labor relations under the Act, the Congress intended to exercise

fully the same plenary and comprehensive commerce power which it had exercised in regulating commerce under the Sherman Act. (212 NLRB 537)

-- As for the Northern Marianas, the NLRB decided in December 1984, in Micronesian Telecommunications Corporation v. International Brotherhood of Electrical Workers, Local 1357 (273 NLRB No. 56), that it has jurisdiction in, and the National Labor Relations Act applies to, the Northern Marianas, in light of section 502(a)(2) of the Northern Marianas Covenant. That section provides for the application to the Northern Marianas of

those laws . . . which are applicable to Guam and which are of general application to the several States as they are applicable to the several states. . . .

(Note, however, that given that language, the NLRB would be without jurisdiction in matters affecting intra-territorial commerce in the Northern Marianas, although it clearly has such intra-territorial jurisdiction in the Virgin Islands, Guam, and Samoa. Laws that apply to the Northern Marianas pursuant to section 502(a)(1) of the Covenant, i.e., "those laws which provide federal services and financial assistance programs", apply to the Northern Marianas "as they apply to Guam"; but the National Labor Relations Act is not one that provides "federal services and financial assistance"--so the Labor Board would have jurisdiction in the Northern Marianas under section 502(a)(2), in the manner in which its law applies "to the several States", and thus only if the activity in question involves commerce between the Northern Marianas and any point outside it).

To judge from the readily available pleadings in the MTG case, an argument was made--but not strenuously pressed--that the Act is inapplicable in the Northern Marianas. The more substantial argument in the proceeding involved the question whether the Board should decline to assert its jurisdiction in the particular Northern Marianas case--one involving the

selection and recognition of an exclusive collective bargaining agent for employees of the Micronesian Telecommunications Corporation. The Corporation argued that the Board should exercise its discretion to decline jurisdiction under the provision appearing at 29 U.S.C. 164(c)(1):

The Board, in its discretion, may . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.

The Union argued that the dispute was substantial and that the Board should assert jurisdiction. In its MTC decision, the Board did not exercise its discretion to refrain from exercising jurisdiction, and it distinguished its decisions against an exercise of jurisdiction in earlier cases involving the Panama Canal and Wake Island, among others. In 1973 the Board declined to assert jurisdiction in the Panama Canal Zone, stating that while business operations conducted there constitute "commerce" for purposes of the National Labor Relations Act, the Board would exercise its discretion to decline to exercise jurisdiction because of the adverse impact it might have on US-Panamanian relations (202 NLRB 862). Later in the same year the Board declined to exercise its jurisdiction with respect to Wake Island. It assumed arguendo that it had such jurisdiction, but it declined to assert it because Wake had no permanent residents, is geographically remote, and "contains nothing but a military installation" (202 NLRB 1144). The Board concluded that the considerations that "persuaded the Board to decline to assert jurisdiction over businesses in the Panama Canal Zone, Wake Island", and elsewhere were not pertinent to the Northern Marianas.

(The Northern Marianas Commission on Federal Laws has not yet turned to the National Labor Relations Act, but documents filed with it ask the Commission to recommend that the Act be made inapplicable to the Northern Marianas, usually on the

ground that its application would inhibit economic development there).

Two remaining provisions of the National Labor Relations Act deserve discussion here. As earlier noted, the Board is empowered to prevent unfair labor practices. It does this by issuing orders to cease and desist from such practices, and it may enforce those orders by petitioning the courts of appeals or, in certain circumstances, "any district court of the United States" (29 U.S.C. 160(e)). These references to particular Federal courts should pose no problem in the territories of the Virgin Islands, Guam, or the Northern Marianas. In 1952 the Supreme Court concluded, in a case concerning section 303(b) of the National Labor Relations Act (29 U.S.C. 187(b)), that the District Court for the then Territory of Alaska was a "district court of the United States" for purposes of the National Labor Relations Act (Longshoremen v. Juneau Spruce Corp., 342 U.S. 237). The Court observed that the term "district court" has in the past meant a "constitutional court"; when the term is used in its "historic and technical sense", it refers only to a constitutional court; a court that has "the jurisdiction of a district court" does not thereby become a "district court"; and therefore the District Court for Alaska, although it had the jurisdiction of a district court, was not in the "historic and technical sense" a district court of the United States. But the Court concluded that "in the context of" the National Labor Relations Act, the words "district court of the United States" are used "to describe courts that exercise the jurisdiction of district courts" (at p. 241). (For a further discussion of "constitutional courts," see Memorandum No. 29-3(c).) On the basis of that Supreme Court conclusion, the Federal courts in the Virgin Islands, Guam, and the Northern Marianas are included in the language of 29 U.S.C. 160(e), as are the courts of appeals to which they relate. Their district courts have the jurisdiction of District Courts of the U.S. But there is no Federal district court in Samoa, and no court with the jurisdiction of a Federal district court, so the statutory enforcement procedure would not be available to the NLRB there.

Finally, the National Labor Relations Act contains one section that makes express reference to some of the current

territories. If the Board declines to assert jurisdiction over labor disputes under 29 U.S.C. 164(c)(1), discussed earlier in relation to the Northern Marianas, then under 29 U.S.C. 164(c)(2), jurisdiction over such disputes may be assumed and asserted by

the courts of any State or Territory
(including the Commonwealth of Puerto Rico,
Guam, and the Virgin Islands) . . .

This residual jurisdiction could be claimed as well by local courts in the Northern Marianas and Samoa, given the conclusions stated above as to the reach of the National Labor Relations Act generally. The provision reinforces the application of the Act to Guam and the Virgin Islands, and was cited for this purpose in the NLRB's 1965 decision as to Guam, referred to above.

Subchapter III - Conciliation of Labor Disputes; National Emergencies (29 U.S.C. 171-183)

This portion of the Labor Management Relations Act, 1947, begins with a statement of policy and purpose that endorses the "processes of conference and collective bargaining" in the settlement of issues between employer and employee, and states that settlements may be assisted by "full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration" (29 U.S.C. § 171). To that end, the Federal Mediation and Conciliation Service is created (29 U.S.C. § 172), and its services are to be available whenever in the Service's judgment a labor dispute "threatens to cause a substantial interruption in commerce" (29 U.S.C. § 173(b)). The statute contains a further admonition:

The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. (29 U.S.C. § 173(b))

The language of Subchapter III suggests that its draftsman was not mindful of the then (1947) off-shore areas, for "State" is nowhere defined in the Act, although "commerce" is defined for purposes of the Subchapter (29 U.S.C. 142(3), discussed immediately above in connection with the National Labor Relations Act). Because the territories come within the definition of "commerce," the Federal Mediation and Conciliation Service probably has authority to function in those areas--but given the level of economic activities currently conducted in the private sector in the territories, it seems unlikely that many cases would be undertaken by the Federal Mediation and Conciliation Service in any of the territories, at least at this time and in the early future. The Service has, however, accepted jurisdiction with respect to some past disputes in both the Virgin Islands and Guam, as well as in Puerto Rico.

The Subchapter contains a provision for a program of project grants, pursuant to the Labor Management Cooperation Act of 1978 (29 U.S.C. 175a), which the Service may award to provide assistance in the establishment and operation of labor-management committees at the plant, area, or industry level, in order to improve labor management relations, job security, economic development, or productivity. Although the Catalog of Federal Domestic Assistance (at 34.002) defines eligible applicants as "State and local units of government" (as well as labor organizations, private companies, and private nonprofit entities), there is no statutory language that would exclude the territories; and the general jurisdiction of the Federal Mediation and Conciliation Service, as discussed above, indicates that applicants in the territories are legally eligible. It appears, however, that none has received a grant under this authority.

Subchapter III also includes the sections detailing procedures to be followed in the case of strikes that imperil the national health or safety (29 U.S.C. 176-180). These are strikes "affecting an entire industry or a substantial part thereof engaged in trade, commerce . . . among the several States or with foreign nations" which will "imperil the national health or safety" (29 U.S.C. 176). It is hard to imagine a labor dispute in any of the territories that could

have so far-reaching an effect, and accordingly, any uncertainty as to the availability in the territories of the procedure set forth in these sections is probably of academic interest only. That procedure involves a finding by the President that a strike with such far reaching effects is occurring or is threatened; his appointment of a board of inquiry; and following receipt of its report, the President's directive to the Attorney General to petition "any district court of the United States having jurisdiction of the parties" to enjoin the strike (29 U.S.C. 178). The injunction must be discharged 60 days later, with additional days allowed for certain procedural requirements (29 U.S.C. 179, 180).

Some terms here used (such as "States") could interfere with the conclusion that this procedure is available in the territories, but again the definition of "commerce" (which includes the "Territories", and the "territories") continues to apply--so an affirmative conclusion would very likely be reached if a suitable case were ever to arise. It seems improbable, however, that any case could soon arise, given the limited effect upon "commerce" that economic activity in any of the territories now has, or is likely to have for some time to come.

Subchapter IV - Liabilities of and Restrictions on Labor and Management (29 U.S.C. 185-187)

Under 29 U.S.C. 185, "any district court of the United States having jurisdiction of the parties" is given jurisdiction of suits by and against labor organizations, for a violation of a contract between an employer and the labor organization. Given the Juneau Spruce decision of the Supreme Court, discussed above in connection with Subchapter II, there is little question but that the District Courts in the Virgin Islands, Guam, and the Northern Marianas have the jurisdiction in question. Equally, there is no question that courts in Samoa and the Trust Territory are not affected by this section.

Under 29 U.S.C. 186, certain financial transactions involving employers, labor organizations, employees, and others are

barred--the general purpose apparently being to forbid bribery, but to allow pension plans. "The district courts of the United States and the United States courts of the Territories and possessions" are given jurisdiction for violations of the section barring these financial transactions (29 U.S.C 186(e))--which is unusual phraseology, suggesting a legislative intention to cause the Act generally to apply in the unincorporated territories. (That result is consistent, of course, with the cases and opinions detailed in the discussion above under Subchapter II). The United States District Courts in the Virgin Islands, Guam, and the Northern Marianas are clearly covered. The language is inadequate, however, to reach any court in Samoa.

Finally, 29 U.S.C. 187 permits one who has experienced a business or property injury that is the result of an unfair labor practice by a labor organization to sue for damages. Suit may be brought "in any district court of the United States . . . or in any other court having jurisdiction of the parties" (29 U.S.C. 187(b))--yet another formulation pertaining to jurisdiction. As in the other provisions where the first of these phrases occurs, the Federal District Courts in the Virgin Islands, Guam, and the Northern Marianas are clearly comprehended. But the latter phrase would include a court in Samoa as well, if it were to have jurisdiction of the parties.

Conclusion: In most important respects, the key provisions of the Labor Management Relations Act, 1947, apply to the Virgin Islands, Guam, the Northern Marianas, and American Samoa. The Act has no application to the Trust Territory. While it is likely that some sentiment exists in each of the territories to exclude that particular territory from the impact of the Act (as evidenced, for example, by the petitions filed with the Northern Marianas Commission and referred to above), it is also likely that most in the territories are today prepared to accept the continued application of the Act to them. In a number of particulars, pertaining in most cases to the status and jurisdiction of courts in American Samoa, the statute could well be corrected--but given the sensitivity of the subject of labor-management relations, and the resulting difficulty of achieving even noncontroversial amendments, changes in the Act should not be undertaken unless a problem

of genuine magnitude exists. No problem for the territories appears to be of that magnitude now. The most substantial problem relates to the enforcement in American Samoa of NLRB orders to cease and desist from unfair labor practices, but given the current level of economic activities in Samoa, that deficiency too is not major. In sum, the Act applies in large measure to all of the territories; it ought to continue to do so; and it does not apply to the Trust Territory, where both limited economic development to date, and motion toward a new political status, make inappropriate the extension to it of this law. The deficiencies and ambiguities in the Act as to the territories are several, but not pressing. No legislative change is required.

Federal agency comments: Comments were invited from the National Labor Relations Board, the Federal Mediation and Conciliation Service, and the Department of Justice. All comments received have been reflected above, except that the Mediation and Conciliation Service's suggestion that the last paragraph in the Discussion of Subchapter III be deleted has not been accepted. The paragraph is speculative only, but it may be useful speculation.

Notes added in 1993: (1) In connection with the statement above that the Northern Marianas Commission on Federal Laws was importuned in petitions filed with it to recommend that the National Labor Relations Act be made inapplicable to the Northern Marianas, the Commission in its august 1985 Report stated the following:

The Commission's staff examined . . . title 29 but did not compile and edit its research for inclusion in this report [except for the Wagner-Peyser Act, discussed in Memorandum No. 29-2].

The Commission was asked to recommend to Congress that the National Labor Relations Act, Chapter 7 of Title 29, not apply to the Northern Mariana

Islands, but declined to make such a recommendation. (p. 478)

(2) It is concluded above that the National Labor Relations Act applies to Samoa, and that the National Labor Relations Board has jurisdiction there, but it is also concluded that the Board's orders to cease and desist cannot be enforced in Samoa because there is no "district court of the United States" (29 U.S.C. 160(e)) there. It was further concluded when this memorandum was written in 1985 that "given the current level of economic activities in American Samoa" this shortcoming need not be corrected. It may be that circumstances in Samoa associated with its canneries have changed sufficiently in the years since so that the correction should be made. A recommendation to that effect is accordingly included as of 1993, with a nonurgent (**) designation.

Subject: Fair Labor Standards
(The Fair Labor Standards Act of 1938)
Title 29, Chapter 8 (29 U.S.C. 201-219)

Purpose: Through the use of the Congressional power to regulate interstate commerce, to prescribe minimum wages and overtime compensation for employees engaged in commerce, and to eliminate oppressive child labor.

Territorial application: The Fair Standards Act applies to all of the territories--i.e., to the Virgin Islands, Guam, American Samoa, and the Northern Marianas (except that the minimum wage provisions do not apply to the Northern Marianas)--as well as to Enewetak and Kwajalein in the Trust Territory. The Act does not apply elsewhere in the Trust Territory. The use of a Federal injunction to restrain violations of the Act would not be available in Samoa, Enewetak, or Kwajalein, but other enforcement procedures could be used there.

Recommendation: Existing provisions of the Fair Labor Standards Act pertaining to judicial review and enforcement ought to be modified so as to be available fully in the territories, but they present relatively minor problems. The problem of major consequence that should be corrected is the uneven application of the Act to the Pacific territories, where some employers (notably in Guam at present) are disadvantaged in relation to employers in other areas, and where some employees (notably in the Northern Marianas at present) are disadvantaged in comparison to employees in Guam and Samoa.

Discussion: Substance of the statute. The Fair Labor Standards Act applies generally to an employee who "is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce" (29 U.S.C. 206, 207). Such employees must be paid for their services a minimum wage, currently \$3.35 an hour (29 U.S.C. 206(a)(1)), and if employed in excess of 40 hours a week, must be compensated at a rate one and one-half times their regular rate for the hours in excess of 40 (29 U.S.C. 207(a)(1)).

The statutory exceptions from these standards are numerous and somewhat complex, and will not be detailed at length here. Some exceptions of particular interest to the territories are the following categories of employees, who are by statute exempt from both the minimum wage and maximum hour provisions (29 U.S.C. 213(a)):

-- employees in retail or service establishments, if more than 50% of the annual dollar volume of the establishment is derived from sales within the territory, unless the gross volume of sales or business is in excess of \$362,500 (29 U.S.C. 203(s), 213(a)(2));

-- employees engaged in catching, taking, cultivating, or farming any fish or other aquatic life, or in the "first processing" of such fish as an incident to fishing operations (29 U.S.C. 213(a)(5));

-- employees in agriculture, if the agricultural operation is a small one, or if he or she is in the immediate family of the agricultural employer, or if he or she fits within other limited exceptions. (29 U.S.C. 213(a)(6));

Those excepted from the maximum hour provisions (29 U.S.C. 213(b)) include:

-- seamen (29 U.S.C. 213(b)(6));

-- certain employees of radio and television stations (29 U.S.C. 213(b)(9));

-- drivers employed to operate taxicabs (29 U.S.C. 213(b)(17));

-- employees in a motion picture theater (29 U.S.C. 213(b)(27)).

"Oppressive child labor" may not be employed in commerce, in the production of goods for commerce, or in any enterprise engaged in commerce or in the production of goods for commerce (29 U.S.C. 212(c)).

The term means (29 U.S.C. 203(1)):

-- employment of a child under 16 years of age in any occupation, except when the employer is a parent and the occupation is not in mining or manufacturing, or except when the employer is a parent and the occupation has not been found by the Secretary of Labor to be hazardous or detrimental;

-- employment of one between 16 and 18 years, if the Secretary of Labor has found that the employment is hazardous or detrimental to a person of that age.

The Secretary may permit employment of children between 14 and 16 in other than mining or manufacturing, if he finds that the employment will not interfere with their schooling, their health, and their well-being.

Application to the territories and the Trust Territory. The provisions of the Fair Labor Standards Act as to geographical application are not exceptional. The Act applies to persons engaged in "commerce", defined as trade or commerce "among the several States or between any State and any place outside thereof" (29 U.S.C. 203(b)); and it defines "State" as any State, the District of Columbia, "or any Territory or possession of the United States" (29 U.S.C. 203(c)).

In 1948, however, in a decision that caused both surprise and consternation, the Supreme Court held that the term "possession" as used in the Act included a military based leased by the United States from the United Kingdom in the Crown Colony of Bermuda. (Vermilya-Brown v. Connell, 335 U.S. 377.) The Court stated that the fact that the U.S. had no sovereignty in Bermuda was not controlling; and it held that the Congress had authority to legislate on wages and hours for the leased area and that it had done so in the Fair Labor Standards Act. Key departments of the Executive Branch had always held a contrary view, and there was concern that the decision could be troublesome to U.S. relationships with various foreign governments. The decision also skewed the rules-of-thumb that the Interior Department had historically applied in dealing with the offshore areas within its jurisdiction. Until Vermilya-Brown, Interior has been certain that only areas under U.S. sovereignty could be "possessions", "Territories", or "territories", and it had drafted much Federal legislation and construed many Federal statutes on the basis of that premise.

The decision was as a practical matter overturned in 1957, when the Act was amended to apply to particular, explicitly-named areas only: the States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf Lands, American Samoa, Guam, Wake, and the Canal Zone (29 U.S.C. 213(f)). The Senate Labor Committee stated that the language was intended to eliminate "difficult questions of sovereignty" and to remove a matter that had been offensive to "the political sensitivities" of various foreign governments (1957 U.S. Code Cong. and Adm. News 1757). The foregoing list was expanded in 1966 to include three more named areas: Kwajalein Atoll, Enewetak Atoll, and Johnston Island. (The first two of these are atolls in the Marshall Islands, Trust Territory of the Pacific Islands; Johnston is not part of the Trust Territory but is instead a "possession" of the United States in the usual sense of that word, having been annexed by the U.S. in 1858 under the Guano Islands Act, Memorandum No. 48-1(c).) The readily available legislative history does not reveal the rationale for the extension of the Act to these three areas (1966 U.S. Code Cong. and Admin. News 3002-3052). All three areas were, however, either in use or foreseen soon to be in use by Federal military agencies and their Stateside contractors, and a representative from Hawaii in the Congress

who initiated the 1966 amendment was understood to be anxious to have the Act apply there, particularly to any Micronesians employed by the contractors. (It should be noted, however, that more than contractors' employees on Kwajalein and Enewetak are protected by the Act. For example, Micronesians serving as domestics on Kwajalein are also entitled to the minimum wage.)

Hence, the Fair Labor Standards Act applies now--and probably applied from its enactment in 1938--to covered employment in the Virgin Islands, Guam, and American Samoa.

It might reasonably have been argued, prior to the 1966 amendment referred to above, that it then applied to covered employment throughout the Trust Territory as well, but so far as is known, no such argument was made, and in any event there was relatively little activity in the Trust Territory at that time that would have been subject to the Act. In light of the amendment referred to above, from 1966 through the present it has not been applicable in the Trust Territory, except for Enewetak Atoll and Kwajalein Atoll in the Marshall Islands, which are now within the jurisdiction of the Government of the Marshall Islands.

The Northern Marianas differ. Under section 503(c) of the Northern Marianas Covenant (90 Stat. 263, 268), "the minimum wage provisions" of the Fair Labor Standards Act (29 U.S.C. 206) "will not apply to the Northern Mariana Islands", unless Congress decides otherwise following trusteeship termination. However, under section 502(b) of the Covenant,

The laws of the United States regarding . . . the conditions of employment, including the wages and hours of employees, will apply to the activities of the United States Government and its contractors in the Northern Marianas Islands.

As a result, employees in the Northern Marianas who are engaged in "commerce" as defined by the Act, and who are not employees of the United States or its contractors, are covered by the maximum hour provisions of the Fair Labor Standards Act but such employees are not covered by the minimum wage provisions of that Act.

Special industry committees. In recognition of the less prosperous economic conditions of the territories as compared to the States, the Congress has in the past provided for "special industry committees" for certain territories, by which wages that are less than the statutory minimum are recommended by the committee and thereafter imposed for the territory by wage orders of the Secretary of Labor. The subminimum wage rates are to be

. . . the highest minimum wage rates for the industry which it [the special industry committee] determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry, and will not give any industry [in the territory] . . . a competitive advantage over any industry in the United States . . . (29 U.S.C. 208(b))

The Act declares that the policy with respect to the territories is "to reach as rapidly as is economically feasible without substantially curtailing employment the objective of the minimum wage rate" contained in the Act for the United States generally (29 U.S.C. 208(a)).

The Virgin Islands (and Puerto Rico) became the subject of special industry committees in 1940. Such committees for those areas are now a thing of the past, however, because the Congress in 1977 legislated step increases for employees in the Virgin Islands (and Puerto Rico) who were being paid subminimum wages (29 U.S.C. 206(c)), so that all employees in covered employment in the Virgin Islands (and Puerto Rico) are

now subject to the same minimum wage as applies in the mainland.

Special industry committees became available to Samoa in 1956, with the Congress then providing for Samoa a procedure and standards that paralleled those then in effect for the Virgin Islands (29 U.S.C. 206(a)(3)). The legislative history of the Samoa provision shows that the action by Congress in 1956 was in response to the needs of the then two-year old Van Camp fish cannery, that Van Camp was then continuing to operate at a loss, and that the Fono (the legislature of Samoa) had requested the special industry committee procedure for Samoa (1956 U.S. Code Cong. and Admin. News 4587-4589). The legislation provided retroactive relief to employers from liability for failure to comply with the Fair Labor Standards Act in Samoa prior to that 1956 date.

The special industry committee continues in Samoa, and may do so for some time to come, inasmuch as the latest minimum wages ordered by the Secretary of Labor remain in some cases considerably below the \$3.35 required on the mainland. The latest Industry Committee for Samoa (No. 16) established a minimum for fish canning and processing of \$2.67 an hour, effective for one year following July 1, 1984, and \$2.82 thereafter. (By contrast, the first Industry Committee recommended \$.38 an hour, effective June 22, 1957.) For certain other categories, Industry Committee No. 16 recommended for the year following July 1, 1984, \$2.25 per hour for construction workers, \$1.94 for those in retailing and wholesaling, \$1.68 for those in hotel work, and \$1.74 for employees of private hospitals and educational institutions (49 Fed. Reg. 26719). By contrast, all of the foregoing would have been paid, as of June 1957, \$.35 an hour.

Guam has not ever had special industry committees. Thus the minimum wage applicable in the States has been and now is applicable in Guam--judgments apparently having been made over the years that wage levels in Guam approximated those of the mainland, so that machinery for the establishment of subminimum wages there was unnecessary. Rather little appears of record on this subject, but in 1956 the Secretary of Labor did recommend that the Congress provide a special industry

committee procedure for Guam (1956 U.S. Code Cong. and Admin. News 4589). He offered this recommendation, without elaboration upon it, in a letter to the Senate Labor Committee opposing the legislation that created a special industry committee for Samoa (29 U.S.C. 206(a)(3), discussed above), stating that the territories ought not to be dealt with in a piecemeal fashion. The recommendation was not accepted, and in the following year, when the Congress amended the Act to specify explicitly the areas to which it applied, including Guam (29 U.S.C. 213(f)), the Senate Labor Committee Report stated only that it questioned the need for providing subminimum wages in Guam (1957 U.S. Code Cong. and Admin. News 1759). In that 1957 legislation, Congress relieved Guam employers retroactively of liability for violations of the Act occurring before the 1957 amendment.

There have apparently been no official recommendations from the Government of Guam or any component of it for modifications of the Fair Labor Standards Act as it applies to Guam. But there have been recent discussions in Guam, as elsewhere, that a lesser minimum wage ought to be applied to young people; and in 1982, in connection with the Guam Businessmen's White House/Interior Department meetings, a discussion paper on "Labor Constraints", which was prepared by an ad hoc group of Guam businessmen, stated:

While the minimum wage [contained in the Fair Labor Standards Act] and periodic increases may be appropriate in the U.S., they bear no relationship to Guam whose economy is influenced equally as much by the economics of Asia. As a means of allowing Guam labor rates to remain competitive with those found throughout the region, it is proposed that Guam be exempted from any further increases in the U.S. minimum wage law. FLSA wages force labor costs upward in tourism and light manufacturing. Tourism in Asia is very "price-sensitive" and nearby developing island tourist "paradises" are already beginning to syphon off tourists and investors by giving them more for their

money. Labor cost increases, bearing no relationship to the local economy or productivity, place Guam's major private sector industry in a precarious situation.

New agreements developed between the merging island entities [of the Trust Territory] and the United States will encourage economic development in those islands and give them incentives and advantages that are presently enjoyed on Guam, but the FLSA won't be one of them.

When these agreements are concluded, the islands surrounding Guam will provide a far more attractive labor market for light manufacturing and tourism than Guam.

In selected industries on Guam, wage rates could be set by wage orders issued by the Secretary of Labor (FLSA, Section 7) [sic, reference should probably be to section 6, 29 U.S.C. 206(a)(3)] as is the case in American Samoa.

No other or further endorsements of subminimum wages in Guam have lately been heard in Washington.

The Northern Marianas have no need for special industry committees, given the exemption from the minimum wage provisions of the Fair Labor Standards Act that is provided by the Covenant.

Public employees. In amending the Fair Labor Standards Act in 1974, the Congress sought for the first time to place virtually all public employees--of the United States, the States and their political subdivisions, and the territories--under the minimum pay and maximum hour provisions of the Act (29 U.S.C. 203(e)). Soon thereafter, in National

League of Cities v. User, 426 U.S. 833 (1976), the Supreme Court held that this could not constitutionally be done, because it impairs the ability of the States to function effectively in the Federal system.^{1/}

The Court's conclusion, however, was confined to State government employees who engage in "traditional" governmental functions. All other government employees, i.e., those engaged in nontraditional activities, are subject to the minimum wage and overtime provisions of the Fair Labor Standards Act. The Secretary of Labor has since issued statements indicating what governmental functions are nontraditional, so as to provide guidance to public employees. The following list of "nontraditional functions" of States (derived from 44 Fed. Reg. 75628-75630, Dec. 21, 1979, which is the latest list), would apply to the territories as well, and thus territorial employees engaged in these functions would be covered by the wage and hour provisions of the Act:

- railroad operations;
- alcoholic beverage stores;
- off-track betting corporations;
- local mass transit systems;
- generation and distribution of electric power;
- provision of residential and commercial telephone and telegraphic communication;

^{1/} The National League of Cities decision was overruled in 1984 in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, which held that the attempt to distinguish traditional governmental functions from nontraditional is unworkable, as well as inconsistent with established principles of federalism. The paragraphs that follow in the text on this subject are thus of historic interest only, but they may have value for that purpose and as evidence of unworkability.

-- production and sale of organic fertilizer as a by-product of sewage processing;

-- production of agricultural commodities for sale to consumers;

-- repair and maintenance of boats and marine engines for the general public.

The Labor Department also published, along with the foregoing list, its interpretation of "traditional" State functions. These include schools, hospitals, fire prevention, police protection, sanitation, public health, parks and recreation, libraries, and museums. Employees engaged in these "traditional" government activities are not protected by the Fair Labor Standards Act.

The Labor Department has announced a particular list of "nontraditional activities" of government employees in American Samoa. (The list is the result of correspondence during 1978 and 1979 initiated by the Governor of American Samoa and involving the Interior and Labor Departments. The Governor resisted paying the special industry committee's minimum wage for government employees in Samoa to some Government employees, because the Governor believed that they were engaged in "traditional" governmental activities and thus exempt from the minimum wage law under the National League of Cities decision. Ultimately the Labor Department did define "nontraditional" for Samoa's purposes. No similar effort has been made with respect to the other territories--the Virgin Islands and Guam--almost certainly because territorial governmental wage rates in those territories, whether for traditional or nontraditional activities, are above the Federal minimum.) In its report of March 1984, entitled "Various Industries in American Samoa", the Labor Department (Employment Standards Administration, Wage and Hour Division) listed the following as nontraditional governmental activities in Samoa, to which the then current minimum wage of \$1.79 per hour would apply (but all Samoa Government employees were then paid in excess of that rate):

-- communications, including the installation, repair, and maintenance of telecommunications equipment - 86 workers;

-- production and distribution of electric energy - 138 workers

-- marine railway, providing vessel maintenance and repair - 119 workers; and

-- liquor store - 4 workers.

The rationale used by the Supreme Court in concluding in the National League of Cities case that the Congress could not impose a minimum wage with respect to State employees in traditional government work, is not a rationale that would limit the Congress' power in the case of employees of territorial governments. The Congress' plenary power under Article IV of the Constitution would unquestionably permit it to legislate on this subject for the territories. Nevertheless, the Labor Department has concluded that it will, specifically in the case of Samoa, apply the National League of Cities rule in the territories in the same manner as to the States, its Solicitor having advised in an opinion dated June 27, 1977, that that approach is most compatible with the Congress' intent that the application of the Fair Labor Standards Act not be more onerous in Samoa than in the States. The Labor Solicitor's reasoning applies as fully to the other territories as it does to Samoa. Hence, although Congress has the constitutional authority to regulate salaries of all public employees in the territories, its actions have been administratively construed as regulating the salaries only of public employees in the territories who are engaged only in nontraditional government work. That position appears to be not only consistent with enlightened legislative policy, but it is probably most congenial to the territorial governments.

(Note, however, that employees of the Government of the Northern Marianas Islands are wholly excluded from coverage by the minimum wage provisions of the Act, in light of sections

of the Northern Marianas Covenant, discussed above. But note also some of the uncertainties that seem to exist in Kwajalein and Enewetak, to which the Act was expressly extended in 1966. Employees of the Government of the Marshall Islands, sometimes present on each atoll, are often engaged in nontraditional government functions while there--e.g., the nurturing of coconut trees on Enewetak. Although neither the Marshall Islands Government nor the Government of the Trust Territory has ever been explicitly defined as an "employer" under the Act, nor indeed has the Act ever been explicitly applicable to the Trust Territory generally, the rather extravagant construction that the Supreme Court placed on "possession" under the Act, when it held in 1948 that the term includes a leased base in Bermuda (Vermilya-Brown Co. v. Connell, supra) would make it reasonable to conclude that the Government of the Marshalls is now covered in those two atolls as well. This problem, if it be one, is transitory, for trusteeship termination and section 171 of the Compact will cause the Fair Labor Standards Act to cease to apply to Enewetak and Kwajalein. It currently appears that termination will soon occur.)

Judicial review and enforcement. Three provisions of the Fair Labor Standards Act on this subject merit mention:

(1) Judicial review is provided for wage orders issued by the Secretary of Labor, following recommendations by special industry committees in the Virgin Islands and Puerto Rico (29 U.S.C. 210). The provision is obsolete, inasmuch as such committees no longer function for those areas, as discussed above, but it should be noted that there is no comparable review provision for similar orders issued for American Samoa. In the case of the Virgin Islands and Puerto Rico, the review function was placed in the United States Courts of Appeals for the appropriate circuit, or in the U.S. Court of Appeals for the District of Columbia. Because Samoa is not a part of the Federal court system, judicial review of wage orders applying there--if it were thought to be needed, and apparently it has not been so viewed to this time--would need to be tailored to the peculiar Samoa situation.

(2) Employees covered by the Act may bring suit for unpaid minimum wages, or unpaid overtime compensation in "any Federal or State court of competent jurisdiction" (29 U.S.C. 216(b)). It will be remembered that the term "State" is defined to include "any Territory or possession", and that the term "possession" was defined in Vermilya-Brown in an unusually broad manner. Hence, the courts of American Samoa would have jurisdiction of employees' suits under the Act, as would both the Federal and territorial courts in the Virgin Islands, Guam, and the Northern Marianas. It could reasonably be contended that either the High Court of the Trust Territory, or the courts of the Government of the Marshall Islands, would also have jurisdiction under this section of actions brought respecting Enewetak or Kwajalein--but it may be hoped that trusteeship termination will moot the question before it becomes more than hypothetical.

(3) The Act provides also for injunctions to restrain violations of the Act--violations of, among others, the minimum wage, over-time compensation, and oppressive child labor provisions (29 U.S.C. 217). But jurisdiction to issue injunctions is confined to the "district courts, together with . . . the District Court of the Virgin Islands, and the District Court of Guam", so this remedy is not available in American Samoa. The Commission on the Application of Federal Laws to Guam recommended that the District Court of Guam be given jurisdiction to issue injunctions under this section (H. Doc. No. 212, 82d Cong., p. 6), and this was accomplished in 1957 (P.L. 85-231, 71 Stat. 514). By operation of section 502 of the Covenant, the District Court of the Northern Marianas would also have jurisdiction.

Conclusion: A few deficiencies in the application of the Fair Labor Standards Act to the territories have been identified above (the judicial review of wage orders pertaining to American Samoa, and jurisdiction to issue injunctions in Samoa)--but they appear to be relatively minor. They may merit attention in connection with general amendments to the Act, but there is no apparent urgency in dealing with these subjects.

The larger issue is the uneven application of the Act to the Pacific territories, where accidents of history, and not logic derived from geography or economics, dictate the results: the Act applies as fully to Guam as to the States of the Union; it applies to Samoa, but lesser wage rates are permitted there; and it applies in only a limited way to the Northern Marianas. The proximity of Guam and the Northern Marianas, and their presence in the same market area, suggest either that Guam's employers should be as free of these Federal labor constraints as are employers in the Northern Marianas, or that Northern Marianas employees should be as protected from substandard working conditions as are those of Guam. Through whatever means, and with whichever objective, uniformity in the treatment of these two areas should be achieved.

In devising amendments to the Fair Labor Standards Act to meet this problem, the Trust Territory (and the current provisions for Enewetak and Kwajalein) may sensibly be disregarded as a subject for legislation, because trusteeship termination can be expected shortly to terminate any application of the Act to that area. But the area cannot be dismissed from consideration, because Micronesia will in the future seek to compete with Guam for markets, both U.S. and foreign. And while Samoa is distant and not generally a part of the same market area as Guam or the Northern Marianas, some Samoan products (notably processed fish) may compete with products of Guam and the Northern Marianas. Hence, Samoa's treatment under the Act must harmonize with that of the other Pacific territories.

Any legislative solution to this problem of nonuniformity will be unusually controversial. One might, as a minimum starting point, consider legislation to extend to the Northern Mariana (effective upon trusteeship termination) the treatment now accorded to Samoa (with special industry committees and subminimum wages).

Federal agency comments: Comments were invited from the Departments of Labor and Justice. All comments received have been reflected above.

- Subject:
- (a) Portal to Portal Pay
(The Portal-to-Portal Act of 1947)
Title 29, Chapter 9 (29 U.S.C. 251-262)
 - (b) The Labor Management Reporting and Disclosure Act
of 1959
Title 29, Chapter 11 (29 U.S.C. 401-531)
 - (c) Department of Labor
Title 29, Chapter 12 (29 U.S.C. 551-564)
 - (d) Age Discrimination in Employment
Title 29, Chapter 14 (29 U.S.C. 621-634)

Comment: The statutes considered herein present no problems of sufficient consequence to the territories or the Trust Territory to require legislative change.

Discussion: (a) The Portal-to-Portal Act of 1947 (29 U.S.C. 251-262) was enacted in response to a Supreme Court decision of the preceding year that had the effect of defining "working time" for purposes of the Fair Labor Standards Act in a way that alarmed employers, the Congress, and others. In Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), the Court held that "walking time" by an employee on the employer's premises, from the entry point to the work station, and certain other activities that were preliminary to productive work, constituted working time for purposes of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act. In response, the Portal-to-Portal Act recited numerous findings: among others, that the judicial interpretation was "in disregard of long-established customs"; it created "wholly unexpected liabilities, immense in amount and retroactive in operation"; it threatened "financial ruin of many employers"; it would cause "windfall payments" to employees (29 U.S.C. 251(a)). It then provided that employers would not be subject to liability for failure to pay minimum wages or overtime compensation for an employee's activities unless that activity is covered by an express contract, or unless it is the product of a custom or practice that is not barred by contract (29 U.S.C. 252(a)). Courts "of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia" are subject to these

limitations (29 U.S.C. 252(d)). The term "State" is defined, as in the Fair Labor Standards Act, to mean "any Territory or possession" (29 U.S.C. 262(e)), but this definition is provided for purposes of one section of the Portal-to-Portal Act only (pertaining to actions against a State). There are no other provisions of the Portal-to-Portal Act that assist in determining its geographical application. But because it is in effect an amendment to the Fair Labor Standards Act, among others, and because it contains no provisions suggesting a different result, it should be viewed as having the same basic application as the statute it amends. The Portal-to-Portal Act thus applies, as does the Fair Labor Standards Act, to the Virgin Islands, Guam, Samoa, the Northern Marianas (except for minimum pay provisions), Kwajalein, and Enewetak. (See Memorandum No. 29-5.)

The Portal-to-Portal Act applies also to proceedings concerning minimum wages and overtime compensation under the Walsh-Healey Act (41 U.S.C. 35-45) and the Davis-Bacon Act (40 U.S.C. 276a-276a-5). The application of these laws to the territories is considered in Memoranda No. 41-1(d) and 40-2(c).

(b) The Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401-531) was enacted to promote democratic processes within labor organizations--or, as more colorfully put by one court, "to stop and prevent outrageous conduct by thugs and gangsters" in the union movement (United Bro. of Carpenters & Joiners of America v. Brown, 343 F.2d 872, 882 (1965)). The Act applies to all of the territories--to the Virgin Islands, Guam, and American Samoa expressly (29 U.S.C. 402(b)), and to the Northern Marianas by operation of section 502 of the Covenant. It does not apply to the Trust Territory, and that inapplicability is appropriate in light both of the relative absence of labor organizations there and the current pace of the movement toward trusteeship termination.

In all particulars except one, the statute presents no unusual problems for the territories, and for that reason its content will not be set out in detail here. The one exception pertains to court jurisdiction, largely confined under the Act

to district courts of the United States, defined to include "a United States court of any place subject to the jurisdiction of the United States" (29 U.S.C. 402(r)). That phrase comprehends the District Courts in the Virgin Islands, Guam, and the Northern Marianas, but includes no court in American Samoa--a deficiency that is not of current moment owing to the relative lack of union activity there at this time. But in one particular, noted below, a Samoan court would have jurisdiction now.

The Act guarantees certain basic rights to members of labor organizations (29 U.S.C. 411), and provides for enforcement in district courts of the United States, defined as stated above (29 U.S.C. 412). It requires labor organizations to file their constitutions and bylaws with the Secretary of Labor, and also to file detailed, annual financial reports and to make that information available to their members (29 U.S.C. 431(c)). A failure to do so is enforceable not only in Federal district courts but also in "any State court of competent jurisdiction", a phrase that would include a court in American Samoa. Officers and employees of labor organizations are to file annual financial reports (29 U.S.C. 432); employers are to file annual reports of certain financial transactions with labor organizations or employees (29 U.S.C. 433); labor organizations are to file reports when they serve as trustees for subordinate labor organizations (29 U.S.C. 461); and jurisdiction over these matters is in U.S. district courts (29 U.S.C. 440, 464). Procedures are detailed for the election of union officers (29 U.S.C. 481), and for election challenges (29 U.S.C. 482), again with enforcement jurisdiction in U.S. district courts. A fiduciary duty is imposed upon union officers (29 U.S.C. 501(a)), but actions to enforce this duty may be brought not only in district courts but also in "any State court of competent jurisdiction" (29 U.S.C. 501(b))--language that again includes Samoa.

In sum, the Virgin Islands, Guam, and the Northern Marianas are fully comprehended by the law, and while Samoa is not entirely, there are provisions for enforcement of portions of it there as well. That coverage appears sufficient at this time.

(c) The sections under the heading of the Department of Labor (29 U.S.C. 551-564) concern the creation and organization of the Department and contain no provisions relevant to this study.

(d) The Age Discrimination in Employment Act of 1967 (29 U.S.C. 621-634), now administered by the Equal Employment Opportunity Commission, is intended to "promote employment of older persons based on their ability rather than age", and to "prohibit arbitrary age discrimination in employment" (29 U.S.C. 621(b)). It applies fully to the Virgin Islands, Guam, and American Samoa by name (29 U.S.C. 630(i)), and to the Northern Marianas by operation of section 502(a)(2) of the Covenant. It does not apply to the Trust Territory. It does, however, apply within each of the above named areas (i.e., to employment in intraterritorial commerce)--except for the Northern Marianas, to which it applies as in the States, under section 502(a)(2)--and it applies as well as to employment in industries affecting commerce between a territory and a place outside of it (29 U.S.C. 630(g)). The beneficiaries of the Act must be at least 40 years old, but under 70 (29 U.S.C. 631).

Among the actions prohibited by the Act are an employer's failure to hire because of age; an employment agency's failure to refer an individual for employment because of age; and a labor organization's exclusion of an individual from membership because of age (29 U.S.C. 623). For purposes of the Act, an "employer" must have 20 or more employees, and a "labor organization" must have at least 25 members (29 U.S.C. 630)(b),(e)). Certain of the enforcement provisions incorporate by reference sections of the Fair Labor Standards Act (29 U.S.C. 626(b)), which refers to 29 U.S.C. 216 and 217 --one of which sections includes courts in all of the territories (29 U.S.C. 216), and the second of which includes the District Courts in the Virgin Islands, Guam, and the Northern Marianas (29 U.S.C. 217), but would not include a court in Samoa. A civil action, however, may be brought under the Age Discrimination Act in "any court of competent jurisdiction" (29 U.S.C. 626(c)), so a remedy is available throughout the territories, including Samoa.

In sum, the law does not appear to contain any provisions that would give rise to difficulties in any of the territories.

Conclusion: None of the laws considered herein requires modification to meet the needs of the territories or the Trust Territory.

Federal agency comments: Comments were invited from the Departments of Labor and Justice. All comments received have been reflected above.

Memorandum No. 29-7
July 1984

Subject: Occupational Safety and Health
(The Occupational Safety and Health Act of 1970)
Title 29, Chapter 15 (29 U.S.C. 651-678)

Purpose: To establish and enforce standards to assure safe and healthful working conditions for working men and women, and to assist the States to do the same.

Territorial application: The Act applies to employment affecting commerce in all of the territories--Samoa, Guam, the Northern Marianas, and the Virgin Islands--and in the Trust Territory. It also applies to employment within each of those territories, regardless of whether commerce is affected, but not within the Trust Territory.

Recommendation: The Occupational Safety and Health Act requires no modification to accommodate the needs of the territories or the Trust Territory.

Discussion:

Substance of the statute: The Occupational Safety and Health Act of 1970 requires the Secretary of Labor to establish mandatory standards for occupational safety and health in the workplace, so as to reduce the hazards that cause death or physical harm to employees. The Secretary is to enforce those standards, and in doing so may send inspectors to work places and may issue citations to employers as to violations. If the citation is contested by the employer, jurisdiction to hear the matter is placed in the Occupational Safety and Health Review Commission, whose orders are subject to review by the United States courts of appeals. In addition, United States district courts are given jurisdiction, upon petition of the Secretary of Labor, to issue injunctions when working conditions are unusually dangerous.

A State may assert and enforce its own standard if there is no Federal standard in effect, or it may do so if it has adopted a plan, approved by the Secretary of Labor, under which State standards are enforced that are "at least as effective" as the

corresponding Federal standards (29 U.S.C. 667). A State with a plan approved by the Secretary of Labor may receive Federal grants to assist in administering the program, in an amount up to 50% of the cost of doing so (29 U.S.C. 672(g)). The States may also receive Federal financial assistance in programs dealing with occupational safety and health statistics (29 U.S.C. 673(b)(2)), and for other purposes if the Secretary of Labor uses a State agency to assist in carrying out the Act (29 U.S.C. 656(c)(1)).

Provisions pertaining to the territories. The Occupational Safety and Health Act displays unusual attention to the territories, both in terms of the application of the Act to them and in terms of court provisions. The Act applies fundamentally to "employers" who are "engaged in a business affecting commerce" (29 U.S.C. 652(5)). The term "commerce" means trade or commerce among the States, or between a State and any place outside of it, or "within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands)" (29 U.S.C. 652(3)). The term "State," in turn, includes the Virgin Islands, Samoa, Guam, and the Trust Territory (29 U.S.C. 652(7)). The net effect of the foregoing is that the standards imposed under the Act apply to employers in the Virgin Islands, Samoa, Guam, and the Northern Marianas, whether the employers are engaged in a business affecting interstate commerce or not. But the standards are imposed in the Trust Territory (excluding the Northern Marianas) only if the employer is engaged in a business that affects commerce between that area and one outside it.

The Act applies to the Northern Marianas by operation of section 502(a)(1) of the Covenant, because it is a law that provides "financial assistance programs", and it thus applies to the Northern Marianas as it applies to Guam, so intraterritorial commerce in the Northern Marianas is covered there, as it is in Guam.

The legislative history of the Occupational Health and Safety Act contains a curious statement, suggesting that at one early stage in the legislative process leading to the enactment of the Act, employment affecting intraterritorial commerce within

the Trust Territory may have been intended to be comprehended by the Act. The report of the Senate Committee on Labor and Public Welfare stated that the bill "applies to all employment performed in a business affecting commerce among the states, as well as employment in . . . the Virgin Islands, America Samoa, the Trust Territory of the Pacific Islands . . ." (70 U.S. Code Cong. and Admin. News 5177, 5199). That statement is not consistent with the express exclusion of the Trust Territory from the term "possession" at 29 U.S.C. 652(3), referred to above--but it may be the result of Committee carelessness in expression, inasmuch as Guam was not mentioned in the Committee report and, had greater care been exercised, it would have been.

As for the court provisions, because neither Samoa nor the Trust Territory is a part of the Federal court system, the Act contains a sensible and unusual (perhaps unique) provision. The Act states that

The Secretary of the Interior shall, by regulation, provide for judicial enforcement of this Act by the courts established for areas in which there are no United States districts courts having jurisdiction. (29 U.S.C. 653(a)).

The Secretary of the Interior did so. Secretary's Order No. 2657, as amended, for American Samoa states that the "High Court of American Samoa is hereby given jurisdiction to effect the judicial enforcement of the Occupational Safety and Health Act of 1970". Secretary's Order No. 2918, as amended, contained a similar provision, giving the same jurisdiction to the High Court of the Trust Territory, but that Order was repealed (by Order No. 3039 of April 25, 1979), and jurisdiction of Occupational Safety and Health Act matters has not since been placed by the Secretary of the Interior in any court in the Trust Territory.

Federal grants. Census Bureau statistics show that for the fiscal year 1983, the Virgin Islands received \$156,000 in grants under the Occupational Safety and Health Act, and Guam,

\$19,000. The Virgin Islands, alone among the territories, has had a State plan approved by the Secretary of Labor, and the bulk of its grant in 1983 was for purposes of the administration of that plan. In addition, both the Virgin Islands and Guam received grants for gathering statistics on occupational illnesses and injuries (29 U.S.C. 673(b)(2)), and Guam received funds also in connection with consultations it afforded to small businessmen about the Act (29 U.S.C. 656(c)(1)).

These sums have risen in the current fiscal year. The Virgin Islands is receiving \$229,520 in fiscal year 1984 for the administration of its plan, and Samoa has joined the Virgin Islands and Guam in receiving Federal funds for the gathering of statistics: \$11,000 (Samoa), \$28,000 (Guam), and \$40,000 (Virgin Islands).

No other grants are now received by the territories or the Trust Territory under the Act.

Conclusion: The Occupational Health and Safety Act deals with a subject of relatively little consequence in some of the territories today, but of increasing importance to all of them as they strive for increased economic development. It is thus appropriate that the Act apply to them. The unusual treatment accorded the Trust Territory is no more than that. The Act has little practical application to that area now, and following trusteeship termination, it will have none at all, so further attention to its treatment here would be misplaced.

Federal agency comments: Comments were invited from the Departments of Labor and Justice. All comments received have been reflected above.

Memorandum No. 29-8
July 1984
Revised April 1985

- Subject: (a) Vocational Rehabilitation and Other Rehabilitation Services
(The Rehabilitation Act of 1973, as amended)
Title 29, Chapter 16 (29 U.S.C. 701-796i)
- (b) Employee Retirement Income Security Program
(Employee Retirement Income Security Act of 1974)
Title 29, Chapter 18 (29 U.S.C. 1001-1461)
- (c) Job Training Partnership
(Job Training Partnership Act, 1982)
Title 29, Chapter 19 (29 U.S.C. 1501-1781)
- (d) Migratory and Seasonal Agricultural Worker Protection
Title 29, Chapter 20 (29 U.S.C. 1801-1872)

Comment: The statutes considered herein present no problems of consequence to the territories or the Trust Territory, and they require no change to accommodate territorial needs.

Discussion: (a) Under the title Vocational Rehabilitation and Other Rehabilitation Services (29 U.S.C. 701-796i), there appears the Rehabilitation Act of 1973 and the amendments to it, the most extensive of which are the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, and the Rehabilitation Amendments of 1984.

The Rehabilitation Act is a major Federal grant statute--authorizing upwards of 30 programs of Federal financial assistance to the States (and the territories and the Trust Territory, as explained below)--whose purpose is "to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living" (29 U.S.C. 701). At least a dozen of those Federal programs are not now being implemented, having been phased out or otherwise not funded for various reasons. Of those programs that continue, by far the most important in terms of the Federal funds available (representing about 90% of the Federal money appropriated annually to carry out the Act) are the grants for the administration of basic vocational

rehabilitation services. These are grants that are based on a formula that takes into account a State's population and per capita income (29 U.S.C. 730). In order to obtain its grant, the State must file a plan, and the plan must meet extensive and elaborate statutory standards (29 U.S.C. 721). The remaining programs of Federal financial assistance under the Rehabilitation Act are almost entirely ones that provide for project grants, where the States (and the territories) compete for the Federal funds available for particular purposes. Among the kinds of projects for which Federal funds may be granted are programs for the training of personnel in rehabilitation services, including the training of interpreters for the deaf (29 U.S.C. 774); and programs for the establishment and operation of independent living centers for handicapped individuals (29 U.S.C. 796e).

The draftsmen of the Rehabilitation Act and its amendments have paid attention to the territories and the Trust Territory. These areas are fully covered by the Act, and they are eligible for all of the Federal assistance provided by it. The term "State" (which is the usual beneficiary of the grants) is defined to include the Virgin Islands, Guam, American Samoa, and the Trust Territory (29 U.S.C. 706(14)), and because this definition dates from 1973, it is understandable that the Northern Marianas would not be expressly mentioned. The Northern Marianas are, however, comprehended by the Act by operation of section 502(a)(1) of the Covenant, so that the Rehabilitation Act applies to the Northern Marianas in the same manner as it applies to Guam. The Act also provides that in the case of Samoa and the Trust Territory, the governor and the High Commissioner, respectively, will act as the "State agency" for purposes of the grants for basic vocational rehabilitation services (29 U.S.C. 706(14), 721(a)(1)), thereby eliminating the need for the governments of those areas to create separate governmental agencies to administer the grants.

The most important recognition of the territories and the Trust Territory appears in the grant formula. As stated above, a component of the formula for determining entitlements to Federal funds for basic vocational rehabilitation services is the State's per capita income. That component determines the allotment percentage, and the statute provides a floor of

33-1/3 percent and a ceiling of 75 percent for the allotment percentage--except in the case of the territories where it is stipulated at 75 percent (29 U.S.C. 707(a)(1)), doubtless in recognition of the relatively low incomes in those areas. Further provisions are also of interest to indicate the statute's recognition of the territories. In addition to the grant for administration of basic vocational rehabilitation services, referred to above, there are only two other formula grant programs under the Rehabilitation Act, and each shows particular recognition of the territories. There is, first, the program for comprehensive services for independent living, which contains a minimum provision for "Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory" (29 U.S.C. 796b(a)(2)). (That provision was enacted in November 1978, so that express mention of the Northern Marianas was then necessary in order that that area be covered.) And second, there is the grant program for client assistance (which was made a formula grant program in 1984, by section 113 of Public Law 98-221), designed to advise applicants of benefits provided by the Act and to assist in obtaining them (29 U.S.C. 732). Under the client assistance program, the States as such receive allotments based on population, with a floor of \$50,000. American Samoa, Guam, the Virgin Islands, the Northern Marianas, and the Trust Territory are each entitled to receive \$30,000. Finally, the Act provides that the section of the Territories Omnibus Act of 1977 that provides for grant consolidation and for the waiver of certain matching requirements by the territories (48 U.S.C. 1469a) "shall not apply" to the Rehabilitation Act or to the administration of any program under it (29 U.S.C. 710).

In sum, the territories are not only wholly covered by the Rehabilitation Act, but have been dealt with in it with particular care, in recognition of some of their special circumstances. One might question the wisdom of imposing, particularly upon the smaller territories, the demanding requirements set forth for State plans (29 U.S.C. 721), because people with sufficient sophistication to prepare such a plan cannot be numerous anywhere. But the short answer is that the territories and the Trust Territory have all prepared plans that have passed muster--so the burden, while doubtless onerous, has not proven unmanageable.

It appears that all of the territories and the Trust Territory are receiving grants for basic vocational rehabilitation services. The Bureau of the Census report on Federal Expenditures by State for Fiscal Year 1983 gives no figures for "Rehabilitation services and handicapped research" for that year for American Samoa or the Northern Marianas, but informal advice from the Department of Education, which administers the Act through its Rehabilitation Services Administration, indicates that both are now receiving funds for this purpose. The Report further shows that in fiscal year 1983, under the above heading, Guam received \$575,000; the Trust Territory, \$588,000; and the Virgin Islands, \$677,000. The Interior Department's own grant report for fiscal year 1979, based on information received from grantor agencies, shows that all areas except for American Samoa were then receiving grants for vocational rehabilitation services.

It has sometimes been suggested in recent years that Federal grants under the Rehabilitation Act are among those that should not be afforded to the territories. Those who collect Horrible Examples of Misspent Federal Grants in the territories cite an instance, perhaps apocryphal, that was described in a much-read national news magazine in the late 1970's, of a \$25,000 annual grant to one territory for vocational rehabilitation, all but \$1,000 of which was spent on the salary of the grant administrator there. (That example was never documented.) The probability is that grants for rehabilitation, perhaps more than most Federal grants, are not likely to be terminated for any of the territories. (They will in any case come to an end in the Trust Territory upon trusteeship termination.) The need for them is at least as great in the territories as in the States, because the beneficiaries' cause is every bit as compelling, so neither the territorial governments nor the Congress can be expected to acquiesce in an end to this Federal aid.

(b) Chapter 18, entitled Employee Retirement Income Security Program (29 U.S.C. 1001-1461) contains the Employees

Retirement Income Security Act of 1974, known as ERISA.^{1/} It is a law of unusual length and considerable complexity, the fundamental purpose of which is to protect the individual rights of employees who are covered by private pension plans or other private benefit plans. The law applies to the territories (but not to the Trust Territory) in the same manner as it applies to the States, and it does not appear to contain any provisions that would give rise to unusual difficulties in the territories.

Among ERISA's principal requirements are, first, those pertaining to reporting and disclosure, so that participants in such private pension or other benefit plans are provided with understandable information as to their rights and obligations, and so that the administrator of plans will periodically inform the Secretaries of Labor and the Treasury about the plans (29 U.S.C. 1021 et seq.). The Act imposes fiduciary standards upon those who administer such pension or other benefit plans, among other things holding them to a "prudent man" test (29 U.S.C. 1101 et seq.). As to pension plans, ERISA sets forth participation and vesting standards, the effect of which is to guarantee that employees who meet minimum age and service standards can be covered by the employer's plan, and that at the appropriate point of service the employee's right to retirement benefits cannot be forfeited (29 U.S.C. 1051 et seq.). And as to pension plans, it further requires that certain minimum funding standards be met, so that the plan will accumulate enough assets to pay benefits (29 U.S.C. 1081 et seq.). ERISA creates a wholly owned Government corporation, the Pension Benefit Guaranty Corporation, which is a part of the Labor Department for housekeeping purposes, whose purpose is to guarantee the payment of basic pension benefits in private retirement plans that terminate with insufficient assets (29 U.S.C. 1302). The Corporation is funded privately, and largely by premiums paid by pension plans.

^{1/} Some of those who are required to deal with ERISA have found it appropriate to convert the acronym to Every Ridiculous Idea Since Adam--probably a reflection of the quantity of its provisions, rather than their quality.

ERISA does not apply to government retirement or other Government benefit plans. Given the size of public sector employment in all of the territories, it is government retirement plans that are of principal interest to most workers in the territories. The Act applies instead to plans of private employers, or of employee organizations, who are "engaged in commerce or in any industry or activity affecting commerce" (29 U.S.C. 1003); "commerce" means trade or commerce between any "State" and any place outside of it (29 U.S.C. 1002(11)); and "State" includes the Virgin Islands, American Samoa, and Guam (29 U.S.C. 1002(10)). By operation of section 502 of the Marianas Covenant, the term would also include the Northern Marianas. Thus, plans created by employers (or employee organizations) in the territories, if their activities are not wholly intraterritorial, are covered by ERISA.

Jurisdiction with respect to the enforcement of ERISA provisions is placed in the U.S. district courts; and because they have the jurisdiction of such courts, the U.S. District Courts of the Virgin Islands, Guam, and Northern Marianas would have ERISA jurisdiction. The absence of a court in American Samoa with the jurisdiction of a Federal district court could become a problem, but it is not likely to constitute a major one at this early stage of economic development there. There are probably few, if any, private benefit plans in effect for employees of the private sector in Samoa. In any event, some provisions of ERISA may be enforced in "State courts of competent jurisdiction"--e.g., the right to bring a civil action to recover benefits due under a plan (29 U.S.C. 1132(a)(1)(B), (e)(1))--and it seems probable that this jurisdiction in an appropriate court in American Samoa is sufficient for the present.

The inapplicability of ERISA to the Trust Territory need not be of concern, first because of the probable absence of private benefit plans applicable to employees there, and secondly because of the probable early termination of the trusteeship agreement.

(c) The Job Training Partnership Act (29 U.S.C. 1501-1781), is a new statute (approved October 13, 1982) that

appears to make both careful and adequate provision for the territories. The Act is in part a grant statute, and in its implementation heavy reliance is placed upon the private sector. The purpose of the statute is stated to be two-fold: to establish programs to prepare youth and unskilled adults for entry into the labor force, and to afford job training to economically disadvantaged individuals and others facing serious barriers to unemployment (29 U.S.C. 1501). The Act is a successor to the Comprehensive Employment and Training Act of 1973, which was repealed on the date the Job Training Partnership Act was approved.

All of the areas of current interest--the Virgin Islands, Guam, Samoa, the Northern Marianas, and the Trust Territory--are defined as "States" for purposes of the Act (29 U.S.C. 1503(22)), and all are thus entitled to Federal assistance under the Act, if they meet the statutory tests. The Act defines the machinery necessary in a State or territory for implementation of the Act: the establishment of Service Delivery areas by the Governor, the creation of Private Industry Councils for these areas, the development of job training plans, the creation of a Job Training Coordinating Council.

The grant programs under the Job Training Partnership Act that are of interest to the territories and the Trust Territory are two: training services for the disadvantaged, adult and youth programs (29 U.S.C. 1601 et seq.), and training services for the disadvantaged, summer youth program (29 U.S.C. 1631 et seq.). The former is the major program authorized by the Act. The States as such receive funds under a formula that takes into account the number of unemployed, the number of unemployed in excess of 4.5% of the labor force, and the number of economically disadvantaged (29 U.S.C. 1601(b)). The territories are treated differently: of the Federal funds appropriated for adult and youth programs, up to \$5 million "shall be allotted among" the four territories and the Trust Territory (29 U.S.C. 1601(a)). The statute does not state how the allotment is to be made, nor does the readily available legislative history shed light upon it.

Information received informally from the Labor Department indicates that the \$5 million has been divided among the five offshore areas on the basis of a formula, developed administratively, that takes into account population and unemployment levels. The \$5 million available for the one year commencing July 1, 1984, has been allocated so that Guam is receiving \$1,457,238; the Virgin Islands, \$1,781,828; Samoa, \$350,026; the Northern Marianas, \$125,000; and the Trust Territory, \$1,285,908.

The second and lesser Federally-assisted program, also for training services for the disadvantaged, is for Summer Youth Employment and Training Programs (29 U.S.C. 1631 et seq.). The States again are subject to a formula (29 U.S.C. 1631(b)), while the territories and the Trust Territory (plus in this case, Native Americans) are entitled to an amount measured by what they received in the preceding fiscal year (29 U.S.C. 1631(a)). As a practical matter, this has meant that the four territories and the Trust Territory, all of whom now receive Federal funds for the summer program, are receiving in the current fiscal year 1984 slightly less than they received in fiscal year 1983.

A third Federal grant program pertains to training assistance for dislocated workers. The territories and the Trust Territory almost certainly have no groups of unemployed who would qualify as eligible dislocated workers--those who are, among other things, unemployed as the result of a permanent plant closure (29 U.S.C. 1652(a)); and in fact none of the five areas is receiving any aid for this program in the current fiscal year. The statute would not foreclose it, for funds may be allocated to "States" (29 U.S.C. 1651), a term that includes the offshore areas here in question. But for this Federal aid there is no special provision for the territories, as there is in connection with other grant programs under this law, and at an earlier stage of the legislative process, assistance for dislocated workers was expressly confined to the States as such and the District of Columbia only (1982 U.S. Code Cong. and Admin. News 2636, 2698)--a restriction later removed before the bill became law. This exclusion, however, was probably an accurate reflection of reality.

The Job Training Partnership Act does not appear to contain any provisions that create difficulties for or unfairness in the territories, excluding only the section pertaining to judicial review by the U.S. Courts of Appeals (29 U.S.C. 1578), which thus makes no provision for Samoa. Unless Samoa has real reason to find this omission seriously disadvantageous, however, the deficiency does not seem so serious as to require legislative correction.

One further point concerning Samoa arises in the context of the Job Training Partnership Act. The Conference Committee report on the bill that was ultimately enacted states that the Senate bill "includes American Samoans living in Hawaii as eligible participants"--presumably in job training assistance programs (1982 U.S. Code Cong. and Admin. News 2636, 2731). (It is hard to understand the need for such a provision, because the Senate bill permitted participation by both U.S. citizens and U.S. nationals, so Samoans were not excluded. 1982 U.S. Code Cong. and Admin. News 2645)). That provision was dropped by the Conference Committee, but the Committee proceeded to offer the following comment in its report:

The conferees are concerned with the unique and special employment problems facing the 240,000 American Samoans residing in their homeland, in the State of Hawaii and in the Continental United States.

The poverty among this population is extreme. Half do not have a high school education. Unemployment is well above the national average. Less than one-third are fluent in English.

As a result Samoan families report unacceptable rates of alcoholism, violent crimes, and depression. The conferees believe the United States has a special responsibility for the Samoan people that grows out of the treaties of friendship and commerce negotiated in the last century and the trust relationship

created when the islands were ceded to the United States in the early 1900s.

In order that the Congress can be better informed on how best to meet the employment and training needs of the Samoan peoples, the Secretary of Labor is instructed to transmit a Report to the Congress no later, than October 1, 1983, which details the dimensions of unemployment and poverty among American Samoans and recommends specific actions that can be taken to carry out our historic responsibilities to these people. (1982 U.S. Code Cong. and Admin. News 2636, 2731-32.)

The report has not yet been submitted (July 1984), but the Department of Labor states informally that it is expected that it will be sent to the Congress in the fall of 1984.

(d) The Migratory and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801-1872) requires the registration of those who recruit and hire agricultural laborers, and it provides certain protections to migrant and seasonal agricultural laborers. (The principal distinction between the two categories is whether they are absent overnight from their places of residence. Migratory workers are defined as those who are absent; seasonal workers are not, and are instead "day-haul" workers (29 U.S.C. 1802(8), (10).) The statute applies to the Virgin Islands and Guam (as well as Puerto Rico), alone among the areas that are the subject of this study (29 U.S.C. 1802(12)). The rationale for this application is not apparent, because the readily available legislative history is silent on the point (1982 U.S. Code Cong. and Admin. News 4547-4579), and because there are no migrant or seasonal agricultural workers in Guam, and probably none in the Virgin Islands, at this time. When sugar production was a major endeavor in the Virgin Islands, as it was for centuries until the 1960's but is no longer, aliens were brought to St. Croix in considerable numbers from foreign islands of the West Indies for seasonal employment during the harvesting season--both by the Federal Government, acting through the Virgin Islands Corporation, and by private

growers. But such workers usually entered as temporary nonimmigrant aliens, under the so-called "H-2" provision of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)), and such nonimmigrant aliens are excluded from the coverage of the Migratory and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1802(8)(3)(ii)). So even in light of recent history, the application of this Act to the Virgin Islands seems inexplicable.) There are no migrant or seasonal agricultural workers, at least not in visible numbers, in Samoa, the Northern Marianas, or the Trust Territory, so the absence of these protections there is appropriate. But the application of the Act to Guam and the Virgin Islands is in any event harmless, so there appears to be no need to modify the statute.

Conclusion: None of the laws considered herein requires modification to meet the needs of the territories or the Trust Territory.

Federal agency comments: Comments were invited from the Departments of Education, Labor, and Justice. All comments received have been reflected above.

TITLE 30 - MINERAL LANDS AND MINING

- Contains nothing of substantial interest to the territories.
- * Contain matters of particular interest to the territories, but no legislative recommendations.
- (**) Contains recommendations for changes in the law, but the need for them is not urgent.

<u>Memorandum Number</u>	<u>Subject</u>	<u>30 U.S.C. sections</u>
30-1	- (a) The Bureau of Mines	1-16
	- (b) Mineral Lands and Regulations in General	21-54
	- (c) Lands Containing Coal, Oil, Salts, Asphaltic Materials, Sodium, Sulphur, and Building Stone	71-172
	- (d) Leases and Prospecting Permits	181-287
	- (e) Lease of Gold, Silver, Quick- silver Deposits When Title Confirmed by Court of Private Land Claims	291-293
	- (f) Lease of Oil and Gas Deposits In or Under Railroads and Other Rights-of-Way	301-306
	- (g) Synthetic Liquid Fuel Demonstration Plants	321-325
	- (h) Lease of Mineral Deposits Within Acquired Lands	351-359
	- (i) Development of Lignite Coal Resources	401-404
	- (j) Rare and Precious Metals Experiment Station	411-412
	- (k) Mining Claims on Lands Subject to Mineral Leasing Laws	501-505
	- (l) Multiple Mineral Development of the Same Tracts	521-531
	- (m) Entry and Location on Coal Lands on Discovery of Source Material	541-541i
	- (n) Control of Coal Mine Fires	551-558
	- (o) Anthracite Mine Drainage and Flood Control	571-576
	- (p) Surface Resources	601-615

Title 30
Contents

	- (q) Mineral Development of Lands Withdrawn for Power Development	621-625
	- (r) Coal Research and Development	661-668
	- (s) Lead and Zinc Stabilization Program	681-689
	- (t) Conveyances to Occupants of Unpatented Mining Claims	701-709
	- (u) Mine Safety and Health	801-962
	- (v) Surface Mining Control and Reclamation Act	1201-1328
	- (w) National Materials and Minerals Policy, Research, and Development	1601-1605
	- (x) Oil and Gas Royalty Management	1701-1757
	- (y) National Critical Materials Council	1801-1811
30-2	Geothermal Energy	
	- (a) Geothermal Steam and Associated Geothermal Resources	1001-1025
	* (b) Geothermal Energy Research, Development, and Demonstration	1101-1164
	* (c) Geothermal Energy	1501-1542
30-3	(**) Deep Seabed Hard Mineral Resources	1401-1473

- Subject:
- (a) The Bureau of Mines
Title 30, Chapter 1 (30 U.S.C. 1-16)
 - (b) Mineral Lands and Regulations in General
Title 30, Chapter 2 (30 U.S.C. 21-54)
 - (c) Lands Containing Coal, Oil, Gas, Salts, Asphaltic Materials, Sodium, Sulphur, and Building Stone
Title 30, Chapter 3 (30 U.S.C. 71-172)
 - (d) Leases and Prospecting Permits
Title 30, Chapter 3A (30 U.S.C. 181-287)
 - (e) Lease of Gold, Silver, or Quicksilver Deposits When Title Confirmed by Court of Private Lands Claims
Title 30, Chapter 4 (30 U.S.C. 291-293)
 - (f) Lease of Oil and Gas Deposits In or Under Railroads and Other Rights of Way
Title 30, Chapter 5 (30 U.S.C. 301-306)
 - (g) Synthetic Liquid Fuel Demonstration Plants
Title 30, Chapter 6 (30 U.S.C. 321-325)
 - (h) Lease of Mineral Deposits Within Acquired Lands
Title 30, Chapter 7 (30 U.S.C. 351-359)
 - (i) Development of Lignite Coal Resources
Title 30, Chapter 8 (30 U.S.C. 401-404)
 - (j) Rare and Precious Metals Experiment Station
Title 30, Chapter 9 (30 U.S.C. 411-412)
 - (k) Mining Claims on Lands Subject to Mineral Leasing Laws
Title 30, Chapter 11 (30 U.S.C. 501-505)
 - (l) Multiple Mineral Development of the Same Tracts
Title 30, Chapter 12 (30 U.S.C. 521-531)
 - (m) Entry and Location on Coal Lands on Discovery of Source Material
Title 30, Chapter 12A (30 U.S.C. 541-541i)

- (n) Control of Coal-Mine Fires
Title 30, Chapter 13 (30 U.S.C. 551-558)
- (o) Anthracite Mine Drainage and Flood Control
Title 30, Chapter 14 (30 U.S.C. 571-576)
- (p) Surface Resources
Title 30, Chapter 15 (30 U.S.C. 601-615)
- (q) Mineral Development of Lands Withdrawn for Power
Development
Title 30, Chapter 16 (30 U.S.C. 621-625)
- (r) Coal Research and Development
Title 30, Chapter 18 (30 U.S.C. 661-668)
- (s) Lead and Zinc Stabilization Program
Title 30, Chapter 19 (30 U.S.C. 681-689)
- (t) Conveyances to Occupants of Unpatented Mining Claims
Title 30, Chapter 20 (30 U.S.C. 701-709)
- (u) Mine Safety and Health
Title 30, Chapter 22 (30 U.S.C. 801-962)
- (v) Surface Mining Control and Reclamation
Title 30, Chapter 25 (30 U.S.C. 1201-1328)
- (w) National Materials and Minerals Policy, Research,
and Development
Title 30, Chapter 28 (30 U.S.C. 1601-1605)
- (x) Oil and Gas Royalty Management
Title 30, Chapter 29 (30 U.S.C. 1701-1757)
- (y) National Critical Materials Council
Title 30, Chapter 30 (30 U.S.C. 1801-1811)

Comments: All of the chapters of Title 30 that are discussed herein are without importance to the territories, dealing as they do with minerals and mining that do not exist in the territories. Nevertheless, as explained at appropriate points below, some contain citizenship provisions that should not go unmentioned, and others contain express provisions making them

applicable to the territories--even though that fact is almost certainly irrelevant to the areas in question.

Discussion: (a) The first chapter of the title, The Bureau of Mines (30 U.S.C. 1-16), contains the organic legislation for the bureau. No general geographic limitation is imposed on its activity, but references to the States (at 30 U.S.C. 4c, 7, and 9) suggest that some of its authority does not extend beyond them.

(b) Mineral Lands and Regulations in General (30 U.S.C. 21-54) do not apply to the territories. These provisions relate to the public lands of the United States, of which there are none in any of the current territories, and to the acquisition by "citizens" (30 U.S.C. 22) of mineral rights in those lands. Samoans (and for a time, people of the Northern Marianas) would be thus barred, but this is unlikely to present a problem of practical importance. Frequent references to a "Territory" (e.g., 30 U.S.C. 24, 28, 31) are doubtless confined to the former incorporated territories of the mainland and Alaska--to which these laws were expressly extended in 1900 (30 U.S.C. 49b)--because at the time of enactment of most of this chapter (1872) most U.S. Territories contained public lands with mineral deposits. That is not and has not been true of the current unincorporated territories.

(c) Laws concerning Lands Containing Coal, Oil, Gas, Salts, Asphaltic Materials, Sodium, Sulphur, and Building Stone (30 U.S.C. 71-172) are irrelevant to the territories, being concerned with public lands in the territories that contain these deposits. There are no public lands in the territories. Acquisition is, however, confined to U.S. citizens (30 U.S.C. 71), but this provision is not known to have created a practical difficulty for territorial residents who do not have that status.

(d) Leases and Prospecting Permits (30 U.S.C. 181-287) contains the laws permitting leases to U.S. citizens of U.S. land--often referred to in this chapter as "lands belonging to the United States" (e.g., 30 U.S.C. 241, 261)--containing deposits of coal, phosphates, oil and gas, oil shale, sodium,

sulphur, and potash. These are the laws commonly referred to as the "mineral leasing laws." Except in Guam, U.S. land holdings in the territories are de minimis, and in all of them including Guam, there are no known deposits of these minerals in commercial quantities. Mineral leases and prospecting permits are confined to "citizens" (30 U.S.C. 181), but this is unlikely to pose a practical problem for territorial residents who do not qualify as such.

(e) The sections entitled Lease of Gold, Silver, or Quicksilver Deposits When Title Confirmed by Court of Private Land Claims (30 U.S.C. 291-293) pertain to particular land claims only, and are irrelevant for purposes of this study.

(f) Provisions concerning Lease of Oil and Gas Deposits in or Under Railroads and Other Rights-of-Way (30 U.S.C. 301-306) are also irrelevant, because there are no known deposits of such in the territories, nor are their railroad or other pertinent rights of way.

(g) Authority for Synthetic Liquid Fuel Demonstration Plants (30 U.S.C. 321-325), first provided during World War II, has expired.

(h) The laws entitled Lease of Mineral Deposits Within Acquired Lands (30 U.S.C. 351-359) have the effect of extending the mineral leasing laws (point (d) above) to all lands acquired by the U.S. to which they do not apply. Leases on such land are permitted for deposits of coal, phosphate, oil, oil shale, gilsonite, gas, sodium, potassium, and sulfur. Lands covered would include U.S. land in the territories, but such lands are not known to hold deposits of such minerals. Leases may run only to U.S. citizens (30 U.S.C. 352, which incorporates 30 U.S.C. 181 by reference), but this is not likely to create a practical problem.

(i) The Development of Lignite Coal Resources (30 U.S.C. 401-404) is irrelevant to the territories, being concerned with research pertinent to the lignite-consuming region of North Dakota.

(j) The Rare and Precious Metals Experiment Station (30 U.S.C. 411-412) is irrelevant, being concerned only with the Sierra Nevada mining region.

(k) Mining Claims on Lands Subject to Mineral Leasing Laws (30 U.S.C. 501-505) are irrelevant, being concerning only with the mining claims located between 1939 and 1953.

(l) The laws concerning Multiple Mineral Development of the Same Tracts (30 U.S.C. 521-531) relate to assorted subjects, such as preference categories for mining claims, uranium leases, reservations of rights to the U.S., and multiple use, none of which are relevant to the territories.

(m) Entry and Location on Coal Lands on Discovery of Source Material (30 U.S.C. 541-541i) is irrelevant, being concerned with "public lands of the United States classified as or known to be valuable for coal" (30 U.S.C. 541).

(n) The Control of Coal Mine Fires (30 U.S.C. 551-558) concerns a problem of which the territories are free.

(o) The problem of Anthracite Mine Drainage and Flood Control (30 U.S.C. 571-576) is again one that does not exist in the territories.

(p) The laws codified under Surface Resources (30 U.S.C. 601-615) relate to the disposal of surface mineral materials (sand, stone, gravel, etc.) and vegetative materials (such as timber) on "public lands of the United States" (30 U.S.C. 601). There are no such lands in the territories.

(q) The laws pertaining to Mineral Development of Lands Withdrawn for Power Development (30 U.S.C. 621-625) pertain to public lands of the United States and are irrelevant to the territories.

(r) Coal Research and Development (30 U.S.C. 661-668) is irrelevant to the territories, for there are no known coal deposits in any of them.

(s) The Lead and Zinc Stabilization Program (30 U.S.C. 681-689), permitting subsidy payments to domestic producers thereof, has substantially terminated (30 U.S.C. 687), but even though there are no lead or zinc deposits in the territories, producers there were in fact permitted to benefit (30 U.S.C. 686(a)(2)).

(t) Authority for Conveyances to Occupants of Unpatented Mining Claims (30 U.S.C. 701-709) are irrelevant to the territories, for there are no mining claims under U.S. law extant in any of them.

(u) The Mine Safety and Health Act, originally enacted in 1969 (30 U.S.C. 801-962), applies expressly to the Virgin Islands, American Samoa, and Guam, and to the Trust Territory of the Pacific Islands (30 U.S.C. 802(c)). In light of the enactment date, the Northern Marianas is covered by operation of law under section 502(a)(2) of the Covenant. The Act provides fundamentally for the promulgation of safety standards for coal mines and, to some extent, for other underground mines as well. Its application as a matter of law to the offshore areas is clear, but its application as a matter of fact is unlikely to occur because of the absence of coal or other underground mines in those areas at this time.

(v) The Surface Mining Control and Reclamation Act (30 U.S.C. 1201-1328), deals almost entirely with surface coal mine operations. As such, it is irrelevant to the territories, although the Virgin Islands, American Samoa, and Guam are expressly covered by it (30 U.S.C. 1291(24)). Because it was enacted in 1977, the Northern Marianas are also covered, by operation of law under section 502(a)(2) of the Covenant.

(w) The National Materials and Minerals Policy, Research, and Development Act of 1980 (30 U.S.C. 1601-1605) is

intended to "promote an adequate and stable supply of materials necessary to maintain national security, economic well-being and industrial production" (30 U.S.C. 1602), and it provides means for the implementation of that policy. The Act contains no geographical limitations, and it is reasonable to suppose that the territories are comprehended by it.

(x) The subject of Oil and Gas Royalty Management (30 U.S.C. 1701-1757) is not one of interest to the territories, even though the Act (enacted in 1983) is expressly applicable to the territories and possessions and the Trust Territory (30 U.S.C. 1702(16)). The Act is intended to insure prompt and proper collection of oil and gas revenues owed to the U.S. under gas and oil leases on Federal lands, but such leases do not exist in the territories.

(y) The National Critical Materials Council (30 U.S.C. 1801-1811), created in 1984, is intended to coordinate Federal materials research and development policies and programs. The Council's charter contains no geographic limitations, and its authority doubtless comprehends the territories as well as the States of the United States.

Conclusion: None of the foregoing chapters of Title 30 contain any laws that require modification to meet the needs of the territories.

Federal agency comments: Comments were invited from the Department of the Interior and the Department of Justice. All comments received have been reflected above.

Subject: Geothermal Energy

- (a) Geothermal Steam and Associated Geothermal Resources
Title 30, Chapter 23 (30 U.S.C. 1001-1025)
- (b) Geothermal Energy Research, Development, and
Demonstration
Title 30, Chapter 24 (30 U.S.C. 1101-1164)
- (c) Geothermal Energy
Title 30, Chapter 27 (30 U.S.C. 1501-1542)

Note: The Interior Department's Geological Survey reports informally that on the basis of its current information, there may be some geothermal potential in the Northern Marianas, but there are no known or identified sites in the Virgin Islands, Guam, or American Samoa.

Comment: The laws pertaining to geothermal energy are largely uncertain as to their application to the territories, but should there develop a practical need to have them apply, reasonable arguments could be presented to support that result. Except for the Northern Marianas, however, it seems unlikely that the question will arise.

Discussion: (a) The Chapter entitled Geothermal Steam and Associated Geothermal Resources (30 U.S.C. 1001-1025) contains the Geothermal Steam Act of 1970, which authorizes the Secretary of the Interior to lease lands administered by him for purposes of the development and utilization of geothermal resources. Lands susceptible to leasing (30 U.S.C. 1002), which exclude national park and fish and wildlife reservations (30 U.S.C. 1014(c)), are probably nonexistent in all of the territories, possibly excluding Guam, but they would be de minimis there. Accordingly, the uncertainty of geographical application of the Act is untroublesome. The Act contains no statement of its geographic application; its readily available legislative history provides no assistance (1970 U.S. Code Cong. and Admin. News 5113); but it does contain references to the "States" (30 U.S.C. 1008, 1017, 1021), and to U.S. citizens (30 U.S.C. 1015). The Act was almost certainly passed without the territories in mind, but the references to

"States," in context, do not appear geographically confining. Hence, in the unlikely event that the law might be of value in any of the territories, it could reasonably be construed as available for use there.

(b) The Geothermal Energy Research, Development, and Demonstration Act of 1974 (30 U.S.C. 1101-1164) has in part expired, but a program of loan guarantees for the commercial development of geothermal resources (30 U.S.C. 1141-1147) is the subject of a continuing authorization (30 U.S.C. 1164(c)). This law, too, appears to have been enacted without the territories in mind. There is no provision for geographic application; the readily available legislative history is silent on the point (1974 U.S. Code Cong. and Admin. News 5234); and numerous references to the "States" appear (e.g., 30 U.S.C. 1141(g), 1145 (a) and (c)). Their effect, however, is not to confine the program to States alone, nor is there any requirement that the program must be conducted on Federal lands. In the circumstances, the benefits of the program could reasonably be construed as extending to the territories.

(c) The chapter entitled Geothermal Energy (30 U.S.C. 1501-1542), contains the Geothermal Energy Act of 1980. It has in part expired, but programs authorized for geothermal reservoir insurance and reinsurance (30 U.S.C. 1521) and for loan assistance for development of geothermal resources for nonelectric application (30 U.S.C. 1531) continue as a matter of law. No language excludes the territories, and for purposes of the insurance program, reference is made to resources "in the United States" (30 U.S.C. 1522(b)). Additionally, the definition of "person" for purposes of the insurance program (30 U.S.C. 1522(b)(7)) incorporates definitions found in the shipping laws (46 U.S.C. 802, 883-1(a)-(e)), which themselves refer to the "possessions." And the citizenship requirement has, in effect, been waived as to citizens of the Northern Marianas for the period preceding trusteeship termination (Proclamation 5207, sec. 4(m)). The territories may thus be viewed as potential beneficiaries of the program.

Conclusion: Although they are unlikely to be of substantial value to the territories, the Federal laws pertaining to geothermal development appear to be available for application there.

Federal agency comments: Comments were invited from the Department of the Interior and the Department of Justice. All comments received have been reflected above.

Subject: Deep Seabed Hard Mineral Resources
Title 30, Chapter 26 (30 U.S.C. 1401-1473)

Note: Information received informally from the Interior Department's Minerals Management Service and from the Geological Survey suggests that there may be a realistic deep seabed mining potential in all of the territories that are the subjects of this study.

Comment: The Deep Seabed Hard Mineral Resources Act applies to the deep seabed beyond the continental shelf off the territories. Under current law, it applies no closer than 200 nautical miles from land. If deep seabed mining seems likely to become a reality in any of the territories, the Act should be amended to meet particular territorial circumstances.

Discussion: In 1980, the Congress enacted the Deep Seabed Hard Mineral Resources Act, making clear in the legislative language (30 U.S.C. 1401, 1402) as well as in the legislative history (1980 U.S. Code Cong. and Admin, News 1600) that the Act is intended as an interim measure, to be replaced upon U.S. ratification of the Law of the Sea Treaty. Inasmuch as the Treaty, and particularly its seabed resources provisions, are currently in disfavor in the Executive Branch, the statute may have a longer life than was anticipated upon its enactment.

The purpose of the Act is to exercise U.S. jurisdiction over its citizens and over vessels of the United States when they engage in exploration for and commercial recovery of "hard minerals", defined as manganese, nickel, cobalt, and copper. (To obtain any of these, except for copper, the U.S. relies heavily upon imports). The "deep seabed" is the area beyond the Continental Shelf of any nation, or beyond "any area of natural resource jurisdiction" of a foreign nation, if the U.S. recognizes the claim (30 U.S.C. 1403(4)). The seabed under these deep waters is understood under generally accepted principles of international law to be the property of no one, and thus subject to appropriation by anyone (1980 U.S. Code Cong. and Admin. News 1601).

A license or permit is required, issued by the Administrator of the Oceanic and Atmospheric Administration, of any U.S. citizen who engages in exploration or commercial recovery in the deep seabed (30 U.S.C. 1411(a)). A license is required for exploration; a permit, for commercial recovery. Permittees are required to use vessels of the United States in their operations (30 U.S.C. 1412(c)(2), (3)); and generally minerals recovered are to be processed "in the United States" (30 U.S.C. 1412(c)(5)).

The "United States" is defined to include, by name, American Samoa, the Virgin Islands, and Guam, and "any other Commonwealth, territory, or possession of the United States" (30 U.S.C. 1403 (13)). The quoted phrase comprehends the Northern Marianas, with respect to which the United States may legislate under section 105 of the Covenant. Civil and criminal penalties for violations of the Act are provided, and "exclusive jurisdiction" with respect to them is given to the district courts of the United States (30 U.S.C. 1467).

In enacting the Deep Seabed Hard Mineral Resources Act, the Congress clearly sought to accord equal treatment to all people of the United States in all parts of the United States. The broad definition of the term "United States" makes that clear. But two problems, neither immediately pressing, arise:

(1) Samoans who are noncitizen nationals could not receive permits or licenses, nor is there in Samoa a court with enforcement jurisdiction; and

(2) the requirement for the use of vessels documented under U.S. law would be difficult and probably very costly if activities in the areas of the U.S. territories were undertaken.

The first problem would become pressing only if deep seabed mining activity in the Samoan region were to be undertaken. If it were, the Act should be amended to include U.S. nationals in the definition of U.S. citizens, and the matter

of court jurisdiction should be attended to--possibly by extending the jurisdiction of the U.S. District Court in Hawaii. (If a Samoan who is a noncitizen national were to commence exploration or commercial recovery now, presumably he could do so without fear of punishment, because only citizens are subject to the enforcement provisions. But that would surely violate the Congress' purpose, so Samoans should be admonished to refrain from taking advantage of this legislative oversight. The same is true of the people of the Northern Marianas, in the interval preceding trusteeship termination.)

The second problem, arising from the requirement for use of vessels documented under U.S. law, could become substantial, should deep seabed mining develop in any U.S. territorial area. All of the territories, except for Guam, are free of the coastwise laws (see Memorandum No. 46-5), and are served in large measure by foreign vessels. It is, however, clear from the legislative history of the Deep Seabed Act that the U.S. vessel requirement was a hard-fought one (1980 U.S. Code Cong. and Admin. News 1623, 1695, 1705). Unless or until deep seabed mining becomes a realistic economic activity in territorial areas, it would be unwise to undertake a new legislative struggle on the subject.

Conclusion: The Deep Seabed Hard Mineral Resources Act, which applies to all U.S. citizens and to all the territories subject to this study, should be modified if deep seabed mining prospects develop in the area of American Samoa, where citizenship and court provisions would require attention. If such mining develops as a realistic possibility in any territorial area, consideration should be given to relieving activities in those areas of the requirements for use of vessels of the United States.

Federal agency comments: Comments were requested from the Department of Justice and the Department of the Interior. All comments received have been reflected above.

Title 31 - MONEY AND FINANCE

- Contains nothing of substantial interest to the territories.
- * Contains matters of particular interest to the territories, but no legislative recommendations.
- (**) Contains recommendations for changes in the law, but the need for them is not urgent.

<u>Memorandum Number</u>	<u>Subject</u>	<u>31 U.S.C. sections</u>
31-1	- Subtitle I - General	101-779
	- Subtitle II - The Budget Process	1101-1557
	(**) Subtitle III - Financial Management	3101-3906
	* Subtitle IV - Money	5101-5323
	* Subtitle V - General Assistance Administration	6101-7507
	** Subtitle VI - Miscellaneous	9101-9702

Subject: Title 31, Money and Finance

Subtitle I - General (31 U.S.C. 101-779)

Subtitle II - The Budget Process (31 U.S.C. 1101-1557)

Subtitle III - Financial Management (31 U.S.C. 3101-3906)

Subtitle IV - Money (31 U.S.C. 5101-5323)

Subtitle V - General Assistance Administration (31 U.S.C. 6101-7507)

Subtitle VI - Miscellaneous (31 U.S.C. 9101-9702)

Comment: With few exceptions, the laws contained in Title 31 meet the needs of the territories--the codification, which was enacted into positive law in 1982, having generally made careful references to them. On two subjects, however, changes in the law would be helpful, although as to the first, there is no known immediate need: Federal officers and employees may not now allot portions of their pay to credit unions chartered in the territories (31 U.S.C. 3332); and, owing to the absence in Samoa of a Federal court, the laws pertaining to surety bonds do not fully apply there (31 U.S.C. 9301-9309). Additionally, the Northern Marianas Federal Laws Commission recommended that three sections of Title 31 be made applicable to the Northern Marianas: 31 U.S.C. 3303(b) (Federal depositaries); 3331(c) (substitute Federal checks); and 7302(2) (public participation in block grant proposals). For the reasons stated below in connection with each of those sections, clarifying legislation does not appear to be required. Finally, if any of the kinds of land that are subject to Federal payments in lieu of taxes were hereafter to exist in the Northern Marianas or American Samoa (e.g., lands within a national park or forest), then the pertinent provision of that law (31 U.S.C. 6901(2)) should be expanded to name them both.

Discussion: Subtitle I, General (31 U.S.C. 101-779), contains no provisions of substantial interest to the territories, and none that need modification to meet territorial needs. The bulk of the provisions represent the organic acts for the Treasury Department, the Office of Management and Budget, and the General Accounting Office--Federal agencies with authority that potentially affects the territories in material ways, but

not differently from the manner in which other parts of the United States are affected.

A definition of "United States" is provided at 31 U.S.C. 103-- where the term is defined "when used in a geographic sense" to mean only the States and the District of Columbia--but that narrow definition does not appear to have any troubling effect so far as the territories are concerned.

Although the term is used in abundance as an adjective (for example, as the usual modifier of "Government"), it is almost never used geographically. Indeed, only one instance that is of significance for purposes of this study has been found in the entire Title where the "United States" is used in a geographic sense (31 U.S.C. 5111(a), discussed under Subtitle V below), and it poses no problem there.^{1/}

Subtitle II, The Budget Process (31 U.S.C. 1101-1557), concerns the preparation of the Federal budget, appropriations and limitations upon them, and the handling of and accounting for appropriated funds. Of course these are subjects of intense interest in the territories, but their interests do not differ from those of other parts of the United States. No provisions create problems peculiar to the territories.

Subtitle III, Financial Management (31 U.S.C. 3101-3906) contains laws concerning the public debt; the deposit, custody, and disbursement of Federal funds; Federal accounting and auditing procedures; the procedure for handling claims by and against the Federal Government; and prompt payment for goods and services received by the Federal Government.

^{1/} The term "United States" is otherwise used in Title 31, arguably in a geographic sense, but not in a way hurtful to the territories. For example, at 31 U.S.C. 321(a)(8), the Secretary of the Treasury is called upon to "maintain separate accounts of taxes received in each State, territory, and possession of the United States." The usage there may be more adjectival than geographic, but it matters not since the territories are provided for.

Because numerous sections of this Subtitle refer to "territories and possessions," but at other times to "States" alone, the sections that do so will be discussed in turn below. Only one appears to require modification to meet territorial needs, but because the Northern Marianas Federal Laws Commission concluded differently as to several, its conclusions will also be discussed wherever pertinent.

-- 31 U.S.C. 3105 concerns the issuance and redemption of U.S. savings bonds and savings certificates. At subsection (d), the Secretary of the Treasury is authorized to permit a financial institution to act as "paying agent" for redemption only if the financial institution "is incorporated under the laws of the United States, a State, the District of Columbia, or a territory or possession of the United States." Title 31 was enacted as positive law in 1982, after the operative date in section 502(a)(2) of the Northern Marianas Covenant--a section that has the effect of extending to the Northern Marianas Federal laws applicable to Guam "and to the several States" on January 9, 1978. But because 31 U.S.C. 3105(d) was derived from a law originally enacted in 1943, section 502(a)(2) causes 31 U.S.C. 3105(d) to apply to the Northern Marianas. (The Northern Marianas Commission reached the same conclusion.) Hence, banks throughout the territories--in the Virgin Islands, Guam, the Northern Marianas, and Samoa--are eligible.

-- 31 U.S.C. 3121(g)(2) pertains to bonds, notes, and other certificates of indebtedness issued by the United States, which must usually be registered with the Treasury Department to show their ownership. But this registration is not required if, among other things, "interest on the obligation is payable only outside the United States and its territories and possessions." All of the territories, including the Northern Marianas, are included within this phrase. The Northern Marianas Commission reached that conclusion on the basis of section 502(a)(2) of the Covenant (Report, pp. 487-8), but inasmuch as 31 U.S.C. 3121(g) derives from Public Law 97-248, approved September 3, 1982, that basis is inadequate. The same result can be reached, however, under section 105 of the Covenant, under which the United States may enact laws applicable to the post-trusteeship Northern Marianas, by using the term "territories," and without naming

the Northern Marianas specifically, if the particular law may also "be made applicable to the several States." The law appearing at 31 U.S.C. 3121(g)(2) is such a law, so the Northern Marianas are included in the reference to "territories and possessions" therein.^{2/}

-- 31 U.S.C. 3124(a) exempts obligations of the United States Government from most taxes imposed "by a State or political subdivision of a State." This means, for example, that interest on a U.S. savings bond is not "income" to a State taxpayer under the income tax laws of the pertinent State. But even though they are not named in the subsection, the territories also are barred from imposing their income taxes on obligations of the United States and interest arising from them--this as a result of Constitutional doctrine dating from McCulloch v. Maryland (1819, 17 U.S. 316). The Northern Marianas Commission reached the same conclusion, and its rationale, being both clear and persuasive, is quoted here:

. . . section 3124(a) should be regarded as prohibiting taxation of federal obligations by territories or possessions, or their political subdivisions. Section 3124(a) implements Article I, Section 8, Clause 2, of the United States Constitution, which empowers Congress "to borrow [m]oney on the credit of the United States." To allow States to tax notes, bonds and other obligations of the United States

^{2/} This construction is consistent with the views of the Northern Marianas Commission, expressed in a prefatory comment--although as stated there the proposition is presented as to a post-termination law that is not applicable to the States; viz.,

After termination of the trusteeship, the Northern Mariana Islands will be a territory or possession of the United States . . . a post-January 9, 1978, statute applicable to the territories and possessions of the United States but not to the several states is not applicable to the Northern Mariana Islands. (Report, p. 32.)

would reduce the yield on those obligations to creditors and thus increase the cost to the Federal Government of borrowing money. The courts have consistently held that to allow the States to tax federal obligations without federal permission is inconsistent with the constitutional supremacy of the national government over the States. See American Bank & Trust Co. v. Dallas County, --U.S.--, 103 S. Ct. 3369 (1983) [now 463 U.S. 855]; The Banks v. The Mayor, 74 U.S. 16, 23-25 (1868); Weston v. City Council, 27 U.S. (2 Pet.) 449, 464-49 [sic, should be 464-469] (1829). The same principle is applicable to territories and possessions: To allow a territory to tax federal obligations without federal consent would raise the federal cost of borrowing money and is thus inconsistent with the supremacy of the national government. See generally Domenech v. National City Bank, 294 U.S. 199, 205 (1935); Talbott v. Board of County Commissioners, 139 U.S. 438 (1891); Northern Pacific Railroad Co. v. Rockne, [sic, should be v. Traill County] 115 U.S. 600 (1885). Accordingly, section 3124(a) should be construed as prohibiting the government of a territory or possession from taxing obligations of the United States. Since Guam is a territory or possession, by operation of section 502(a)(2) of the Covenant, the Government of the Northern Mariana Islands is similarly constrained from taxing obligations of the Federal Government. (Report, p. 488.)

The Virgin Islands and American Samoa, being territories also, are equally constrained from taxing obligations of the United States.

-- 31 U.S.C. 3124(b) deals with the status of interest on notes, bonds, or other obligations issued by the United States, for purposes of the Federal income tax laws, and provides in effect that such interest is income for Federal income tax purposes. The subsection further provides that

this taxable status does not extend to obligations "issued by . . . a territory or possession of the United State." This result is consistent with the tax exempt status accorded to bonds issued by the territories under other laws: for Guam, in its Organic Act (48 U.S.C. 1423a); for the Virgin Islands, in its Organic Act (48 U.S.C. 1574(b)(i)); for the Northern Marianas, in its Covenant (sec. 607(a)). The tax status of industrial development bonds issued by the Government of American Samoa--the only bonds Samoa is currently authorized to issue--is set forth at 48 U.S.C. 1670.

-- 31 U.S.C. 3303(b) authorizes the Secretary of the Treasury to "designate depositaries in foreign countries and in territories and possessions of the United States to receive deposits of public money". The only question is whether the Northern Marianas are comprehended--the other territories clearly are--and the Northern Marianas Commission concluded that the Northern Marianas are not (Report, p. 149). It therefore recommended that the subsection be amended.

The Commission correctly noted that section 502(a)(2) of the Covenant does not serve to extend the law to the Northern Marianas, because, although it derives from a law enacted in 1922 and thus meets the date test, it is not also a law "of general application to the several States," which is also required by section 502(a)(2). The Commission did not, however, give consideration to the effect of section 105 of the Covenant, and it is reasonable to conclude that under that section the Northern Marianas are already comprehended. Section 105 permits the United States to extend its laws to the Northern Marianas, but if the Northern Marianas are not "specifically named therein" (obviously the case with respect to 31 U.S.C. 3303(b)), then the law does not apply if "such legislation cannot also be made applicable to the several States." The requirement of section 105, unlike section 502(b)(2), is not that the law now applies "to the several States," but that it could be made applicable to them. (The drafters of the Covenant sought to keep the United States Congress from serving as a territorial legislature for the Northern Marianas--something it can constitutionally do under Article IV of the Constitution for territories generally, but which Covenant drafters were at pains to avoid in the case of the Northern Marianas, so as to protect local

self-government.) The authority granted the Secretary of the Treasury under 31 U.S.C. 3303(b) could, as a matter of law, be extended to the States, and in fact various other provisions of Federal law have that effect (e.g., 12 U.S.C. 90, 332, 391). In the circumstances, an amendment to include the Northern Marianas expressly does not appear to be necessary. The territories are all comprehended by the current provision.

-- 31 U.S.C. 3329 pertains to the sending of checks to a foreign country "from the United States or from a territory or possession of the United States", when "local conditions" in the foreign country make check-cashing dubious there. The territories are all included in this reference. A similar reference in 31 U.S.C. 3330 to "a territory or possession of the United States," in connection with Veterans' Administration checks, also comprehends all of the territories.

-- 31 U.S.C. 3331(c) provides for the issuance of substitute U.S. Government checks, when the original check is lost, stolen, or destroyed, and when the original check was "drawn on a depository in a foreign country or a territory or possession of the United States. . .". The Northern Marianas Commission concluded that although the subsection unquestionably applies to Guam, "it is not applicable to the several States" and thus not applicable to the Northern Marianas. The Commission accordingly recommended legislation to extend the law to the Northern Marianas (Report, 150-151). But such legislation does not appear to be necessary. The 31 U.S.C. 3331(c) provision could be made applicable to the States, as shown in 31 U.S.C. 3331(b), which contains similar authority in the case of the States. Hence, the effect of section 105 of the Covenant, which requires only that the law could be made applicable to the States (see the discussion on this point under 31 U.S.C. 3303(b) above), permits the conclusion that 31 U.S.C. 3331(c) now applies to the Northern Marianas--as it also does to the Virgin Islands, Guam, and Samoa.

-- 31 U.S.C. 3332 permits Federal officers or employees to allot their pay, or portions of it, to "financial institutions"--with that term being defined to mean "a bank,

savings and loan association or similar institution, or a credit union chartered by the United States Government or a State" (31 U.S.C. 3332(a)). On the ground that the Federal or State charter requirement applies only to credit unions, the Northern Marianas Commission concluded that Federal employees may now "allot portions of their pay to accounts in banks and savings and loans in the United States, the territories or possessions, or the Northern Marianas" (Report, p. 151). That conclusion is plausible, if not unarguable--and the pertinent regulation is consistent with it.^{3/}

The Northern Marianas Commission, therefore, recommended that the section be expanded only to the extent necessary to permit pay allotments to credit unions chartered under the laws of the Northern Marianas. That recommendation is, however, appropriate for all of the territories. (The Federal statute that provides for the Federal chartering of credit unions is applicable to all of the territories. See Memorandum No. 12-7(a).) Because the current state of the law is not known to have created any actual problems in any of the territories, the need for an amendment is not urgent, but it would be well to accomplish it when a convenient legislative vehicle is at hand.

-- 31 U.S.C. 3543(b) permits a person "adversely affected by a distress warrant" to bring an action in a district court of the United States. A distress warrant may be issued by the Secretary of the Treasury against a Federal certifying officer or disbursing officer who does not properly account for or pay Federal funds that are within his responsibility (31 U.S.C.

^{3/} For purposes of 31 U.S.C. 3332, the term "financial institution" is defined at 31 C.F.R. 209.2(b) to mean

any bank, savings bank, savings and loan association or similar institution, or Federal or State chartered credit union.

The rearrangement of the words makes clearer that the Federal or State charter requirement applies to credit unions only.

3541). Such an officer in Samoa would have no forum, because there is no Federal district court there. The problem is not large enough, however, to require legislative correction. There are few Federal certifying or disbursing officers in Samoa, and were any so unfortunate as to be the subject of a distress warrant, a forum would be available in Hawaii.

-- 31 U.S.C. 3702(b) provides that claims against the United States Government must be presented within six years of their accrual, except in the case of a claim of a State "or a territory or possession of the United States." The territories are all comprehended by that reference. The law pre-dates 1978, so the Northern Marianas are included by operation of section 502(a)(2) of the Covenant.

-- 31 U.S.C. 3714 permits the Secretary of the Treasury to deduct from money owed to a State by the U.S. any losses the U.S. has suffered because that State has failed to pay principal or interest on defaulted stocks or bonds issued by the State and held in trust by the United States. The term "State" is not defined, and thus does not include the territories, so that the right of setoff provided for in the section does not include them. This result is not hurtful to the territories, and thus for purposes of this study, need not be modified to accommodate them. (It should be noted, however, that setoffs are sometimes otherwise provided for in statutes applicable to particular territorial borrowings, as, for example, in connection with loans to the Guam Power Authority under 48 U.S.C. 1423(a).)

Subtitle IV, Money (31 U.S.C. 5101-5323), concerns two subjects: the coinage and printing of money by the Treasury Department, and its use; and requirements for recordkeeping and reporting of certain monetary transactions. No changes are necessary in this subtitle to meet territorial needs.

The first of these two subjects (Chapter 51, Coins and Currency) contains the law concerning legal tender. Perhaps curiously, the pertinent section--31 U.S.C. 5103, entitled "Legal tender"--does not contain any suggestion of geographical application, providing simply that

United States coins and currency . . . are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts.

The U.S. monetary system is in use in all of the territories, but no Federal statute appears expressly to require it.^{4/} Equally, 31 U.S.C. 5103 does not confine its effectiveness to an area that excludes the territories. On either of two theories, it may be concluded that this section applies to the territories and makes the U.S. currency system applicable to them: perhaps the section applies, because it contains no provision suggesting the exclusion of the territories; or perhaps it applies because it represents an exercise of the Congress' power under Article I, Section 8, Clause 5 of the Constitution ("To coin Money, regulate the value thereof . . ."), and may thus be applicable throughout those areas where the United States exercises sovereignty and where the Congress has legislative authority. In any event, there is no uncertainty in the territories as to effectiveness there of the U.S. monetary system, so no clarifying action is needed.

As a result of local laws in the Trust Territory, U.S. coins and currency have in the past been the official media of exchange in the area, and that remains true in Palau at this time. As for the Freely Associated States, the same situation continues there as well, as a result of section 251 of the Compact, which provides in part that

^{4/} The Northern Marianas Commission reached a more convenient conclusion, based on the belief that 31 U.S.C. 5103 was enacted as part of the National Bank Act, which applies to both Guam and the Northern Marianas (Report, p. 492). (The National Bank Act applies to all of the territories. See Memorandum No. 12-2). If that were so, then 31 U.S.C. 5103 would, through the National Bank Act, be expressly applicable to the territories. But 31 U.S.C. 5103 derives instead from the Coinage Act of 1906 (34 Stat. 255) and from R.S. 3584, approved February 21, 1857 (11 Stat. 163). Neither is part of the National Bank Act, originally enacted in 1864. So another theory is necessary.

The currency of the United States is the official circulating legal tender of the Marshall Islands and the Federated States of Micronesia.

A few other sections under the Coins and Currency title deserve passing mention:

-- 31 U.S.C. 5111(a) directs the Secretary of the Treasury to mint coins in amounts "necessary to meet the needs of the United States." It is this section that uses the "United States" in a geographical sense, and as noted above under Subtitle I, the term when so used is defined for purposes of the title to mean only the States and the District of Columbia. If the conclusion discussed above concerning 31 U.S.C. 5103 is correct, that is, if the effect of the section is to require the use in the territories of the U.S. monetary system, then the "United States" in 31 U.S.C. 5111(a) includes the territories--notwithstanding the definition. As a result, the Secretary of the Treasury must mint enough U.S. coins so that they, too, will not run out. (There does not appear to be a parallel section concerning the amount of currency engraved and printed.)

-- 31 U.S.C. 5114(a) contains a curious provision, dating from 1912. It requires the Secretary of the Treasury to engrave and print U.S. currency and bonds, and also "currency and bonds of United States territories and possessions," in a certain manner (specifically "from intaglio plates on plate printing presses"). As enacted in 1912, the reference was to "backs and tints of bonds and paper money issued by any of the insular possessions of the United States" (37 Stat. 430). Whatever may have been the practice in 1912, no territory or insular possession has issued "paper money" for many decades, for in all of them United States currency alone has been in use. This bit of obsolescence is intriguing but harmless, and need not be removed.

-- 31 U.S.C. 5116(b)(1) authorizes the Secretary of the Treasury to buy silver "mined from natural deposits in the United States, or in a territory or possession of the United

States." Regrettably, no such deposits are known to exist in the territories or possessions.

-- 31 U.S.C. 5154, entitled "State taxation", provides that

A State or a territory or possession of the United States may tax United States coins and currency . . . as money on hand or on deposit in the same way and at the same rate that the State, territory, or possession taxes other forms of money.

The function of the section, as explained in Smith v. Davis, 323 U.S. 111 (1944), is to make clear that Congress intended to immunize from State taxation only interest-bearing obligations of the United States. It is important to note that, notwithstanding its title, the clarification extends to the taxing powers of the territories as well.

The second subject with which Subtitle IV deals--records and reports on certain monetary transactions--raises no questions concerning its applications to the territories. The basic law was enacted in 1970 (now 31 U.S.C. 5311-5323), and it defines the "United States" to mean the States and, "when the Secretary prescribes by regulation, the Commonwealth of Puerto Rico, a territory or possession of the United States, or a military or diplomatic establishment" (31 U.S.C. 5312(a)(5)). The territories and possessions are, by regulation, now included (31 CFR 103.11(m)). The purpose of the law is stated to be that the reports and records that are required may be useful "in criminal, tax, or regulatory investigations or proceedings" (31 U.S.C. 5311). Accordingly, U.S. citizens or other residents of all of the territories are required to file reports pertaining to certain monetary transactions involving a "foreign financial agency" (31 U.S.C. 5314); the import or export of monetary instruments in excess of express amounts (31 U.S.C. 5316); and certain other foreign currency transactions (31 U.S.C. 5315). And the enforcement provisions are also sufficient to include all of the territories: 31 U.S.C. 5317(a) permits issuance of search warrants by "a court

of competent jurisdiction," which would include the High Court of American Samoa; and 31 U.S.C. 5320 provides for injunction proceedings "in the appropriate district court of the United States or appropriate United States court of a territory or possession." The Virgin Islands, Guam, and the Northern Marianas have Federal district courts; and Samoa's High Court would constitute an "appropriate United States court of a territory" under Meaamaile v. American Samoa, 550 F. Supp. 1227 (1982).

Subtitle V, General Assistance Administration (31 U.S.C. 6101-7507), concerns eight separate subjects, most of which hold some interest to the territories, and each of which will therefore be discussed in turn.

-- Program Information (31 U.S.C. 6101-6106) provides for the annual Catalog of Federal Domestic Assistance and for its distribution. Programs for the territories are included in the Catalog (31 U.S.C. 6101(4)(A)(iii)), but they are not among those required by law to receive free copies (31 U.S.C. 6104(d)). This is probably an oversight, but since copies have proven to be readily available for public recipients, the territories' needs for the volume can as a practical matter be met, and legislative correction is not needed.

-- Using Procurement Contracts and Grant and Cooperative Agreements (31 U.S.C. 6301-6308) defines the circumstances in which the United States when providing financial assistance to any recipient (including the territories and possessions, 31 U.S.C. 6302(5)), should use any of the three instruments described: a procurement contract, a grant agreement, or a cooperative agreement. Federal financial assistance to the territories is comprehended by the stated rules--as it should be.

-- Intergovernmental Cooperation (31 U.S.C. 6501-6508) contains a variety of rules and authorizations with respect to Federal financial assistance to the States, the territories, and possessions (31 U.S.C. 6501(8)). Among other things, the United States must provide information on Federal grants when asked by the Governor or the State (or territorial)

legislature (31 U.S.C. 6502); it must effect transfers of grant funds without undue delay (31 U.S.C. 6503(a)); the recipient State or territory need not establish a separate bank account, but it must "account for grant money made available" to it, and make "periodic authenticated reports" (31 U.S.C. 6503(b)); and States and territories may, on a reimbursable basis, receive certain technical information and training assistance (31 U.S.C. 6505). Of particular interest to the territories is the authority by which a Federal statutory requirement for the administration of a Federal grant program by "one State [or territorial] agency or multimember agency" may be waived, when efficient administration warrants it (31 U.S.C. 6504).

-- Revenue Sharing (31 U.S.C. 6701-6724) is the 1972 program under which Federally-collected revenues are paid to States and local governments for their use. The territories are excluded from this program. That is appropriate, inasmuch as under other laws most of the territories have paid to them most Federal revenues collected in the respective territory. The Organic Acts and other Federal laws for the Virgin Islands and Guam so provide (48 U.S.C. 1397, 1645 (Virgin Islands); 48 U.S.C. 1421(h) (Guam)); as does section 703(b) of the Northern Marianas Covenant.

There is no comparable provision for American Samoa, but the income tax law in force in American Samoa was imposed by local law, and the proceeds are thus paid to and retained by the Government of American Samoa. Other Federally-collected revenues in Samoa, such as passport fees, are in total magnitude modest in relation to the annual Federal grant to the territorial government for administration. It is, thus, appropriate that the territories be excluded from general revenue sharing.

-- Payment for Entitlement Land (31 U.S.C. 6901-6907) involves a program of payments in lieu of taxes. The Secretary of the Interior is authorized to make an annual payment "to each unit of general local government in which entitlement land is located" (31 U.S.C. 6902(a)) in place of the real property taxes that would be assessed and payable if the land were not in Federal ownership and thus tax free. The

term "entitlement land" is defined to include, essentially, U.S. land that is within national parks or the National Forest System, land administered by the Bureau of Land Management, or inactive Army installations (31 U.S.C. 6901(1)). Included in the definition of "unit of general local government" are the Virgin Islands and Guam (31 U.S.C. 6901(2))--but not Samoa or the Northern Marianas. The exclusion of these two territories is appropriate, inasmuch as there is no Federal "entitlement land", as defined in the law, in either of them. The treatment of the Northern Marianas, however, has been interesting: The Northern Marianas were included in the definition of "unit of general local government" when Title 31 was enacted into positive law in 1982--this because, as stated in the Explanatory Note, of "section 502 of the Covenant." (Although no elaboration appears in the note, it is probable that section 502 supported this result either because of subsection (a)(1), pertaining to "financial assistance programs" applicable to Guam, or because of subsection (a)(2), pertaining to Federal laws generally that are applicable to Guam and the States.) The following year, however, the definition of "unit of general local government" was amended in the Supplemental Appropriation Act, 1983, to exclude the Northern Marianas (Pub. L. 98-63, 97 Stat. 301, 323). The committee reports do not state why, the only pertinent comment being the Senate Committee's statement that it "has included bill language that clarifies eligibility for payment in lieu of taxes" (S. Rept. 98-148, p. 72). This creates no problem at this time, and constitutes no deprivation now to the Northern Marianas, but if a park were to be created there--or in Samoa--that is part of the National Park System, it would then be appropriate to extend the in lieu payment law to them.

-- Joint Funding Simplification (31 U.S.C. 7101-7112) expired in 1985 (31 U.S.C. 7112).

-- Administering Block Grants (31 U.S.C. 7301-7305) pertains to procedures required in connection with the receipt by States and territories of block grants under the Omnibus Budget Reconciliation Act of 1981. The territories are eligible for such grants. These provisions require the Governor to prepare a report on the proposed use of the block grant (31 U.S.C. 7303(a)); require that before receiving a block grant, the State or territory must conduct "a public

hearing, after adequate public notice, on the proposed use and distribution of the amounts set out in the report" (31 U.S.C. 7303(b)); and require the Governor to conduct periodic financial and compliance audits (31 U.S.C. 7305). The term "State" includes the territories and possessions (31 U.S.C. 7302(2)), but because the date of enactment (September 1981) is later than the effective date of section 502(a)(2) of the Covenant (i.e., January 9, 1978), the Northern Marianas Commission concluded that the block grant procedures do not apply to the Northern Marianas. The Commission recommended that the law be expressly extended to the Northern Marianas (Report, pp. 152-53). Such a clarification would, of course, be harmless, and perhaps helpful, but it does not seem to be essential. This is a law that not only could be made applicable to the States, under section 105 of the Covenant, but it is in fact applicable to both the States and territories, now, on equal terms. (See the discussion above as to the effect of section 105, in connection with 31 U.S.C. 3121(g)(2) and 3303(b).) The Congress clearly intended that these provisions apply to all areas that receive block grants and that are within the Congress' legislative jurisdiction, so it seems reasonable to conclude that the Northern Marianas, along with the other territories, are already comprehended by them.

-- Requirements for Single Audits (31 U.S.C. 7501-7507) contains the Single Audit Act of 1984. It requires each "State"--defined to include expressly the Virgin Islands, Guam, Samoa, and the Northern Marianas (31 U.S.C. 7501(14))--to perform detailed audits as specified therein, if they receive "a total amount of Federal financial assistance equal to or in excess of \$100,000 in any fiscal year . . ." (31 U.S.C. 7502(a)). The purpose of the law is to eliminate the particular audit requirements that often attach to particular Federal assistance programs. All of the territories are required to comply with this law.

Subtitle VI, Miscellaneous (31 U.S.C. 9101-9702) includes three chapters that present no matters of interest to the study: Government Corporations, 31 U.S.C. 9101-9109, containing housekeeping rules for Federal corporations; Government Pension Plan Protection, 31 U.S.C. 9501-9504, containing certain rules for Federal retirement plans; and

Miscellaneous, 31 U.S.C. 9701-9702, concerning Federal services and Federal trust funds. But the fourth, concerning Sureties and Surety Bonds (31 U.S.C. 9301-9309) requires discussion.

Federal laws often require that surety bonds be given, to insure that an individual or a firm will perform an obligation or a contract--and if the individual or firm does not, that the surety corporation will pay a specified sum of money to the agency adversely affected. The chapter on sureties and surety bonds sets forth the criteria for such bonds. The bond may be provided by a corporation incorporated under the laws of "a territory or possession" (31 U.S.C. 9304(a)), but surety corporations may do business only "in a judicial district" (31 U.S.C. 9306(a))--which is in context clearly a reference to a United States District Court. Civil actions against surety companies are permitted "in a court of the United States" (31 U.S.C. 9307), a phrase that excludes a court in Samoa. No difficulty appears in connection with the Virgin Island, Guam, or the Northern Marianas, each of which is a judicial district and has a Federal District Court; but the current law does not apply in all respects to Samoa, and there is no forum in Samoa for suits against surety companies. In two opinions in 1909, the Attorney General reached comparable conclusions as to the Canal Zone (27 Op. Atty Gen. 136) and the Philippine Islands (27 Op. Atty Gen. 208), in each case because neither constituted a "judicial district" and neither had a U.S. District Court; but he held that the law (the predecessor of 31 U.S.C. 9306, at 6 U.S.C. 7) did apply to Puerto Rico, because it was a judicial district and had a district court (27 Op. Atty Gen. 208). There is a means by which surety companies can do business in Samoa,^{5/} but it would be

^{5/} In the second of the opinions cited above (27 Op. Atty Gen. 208), the Attorney General concluded in the case of the Canal Zone that

. . . if a surety company has complied with all other requirements of the law and has duly appointed process agents (1) in the judicial district in which the principal in a fidelity bond resided at the time such
(continued...)

desirable if the law were modified to accommodate Samoa's peculiar judicial arrangement--perhaps by vesting in the High Court the jurisdiction of a district court for this purpose, and by constituting Samoa a "judicial district." Contractors in Samoa have encountered difficulties because of the shortcoming in this law as to Samoa, so an early amendment would be desirable.

Conclusion: When it is convenient to do so, the law pertaining to allotments to State-chartered credit unions should be expanded to include all of the territories (31 U.S.C. 3332); and the law pertaining to sureties and surety bonds should be modified to take account of the absence of a Federal District Court in Samoa (31 U.S.C. 9301-9309). The latter modification in particular could prove helpful.

Federal agency comments: Comments were requested from the Departments of Justice and the Treasury and from the General Accounting Office. All comments received are reflected above, except for the general advice from GAO that if a question exists as to territorial application, clarifying legislation would be desirable.

5/ (...continued)

bond is made or guaranteed, and (2) in the judicial district in which the office is located to which said bond is returnable, or in which it is filed, you are not precluded by law from accepting such surety company as surety on such bond. (at 211)

But if the "principal" were a person or firm resident in Samoa, that advice would not apply.

Title 32 - NATIONAL GUARD

(**) Contains recommendations for changes in the law, but the need for them is not urgent.

Memorandum
Number

Subject

32 U.S.C.
sections

32-1

(**) National Guard

1-716

Memorandum No. 32-1
December 1985
Revised March 1987

Subject: Title 32 of the United States Code
National Guard^{1/}
(32 U.S.C. 1-716)

Purpose: To provide for an Army National Guard and an Air National Guard for the States and certain of the territories, and for their activation for Federal duty when the national security requires it.

Territorial application: National Guard units are authorized for the Virgin Islands and Guam. The law does not provide for a National Guard unit in American Samoa or the Northern Marianas.

Recommendation: The needs of the Virgin Islands and Guam are met by the current provisions of Title 32. The exclusion of American Samoa and the Northern Marianas does not seem inappropriate, given the absence of interest on the subject evidenced in those areas. Hence, territorial needs appear to be met adequately under the existing Title 32. Some minor shortcomings of legislative draftsmanship might, however, helpfully be corrected when it is convenient to do so.

Discussion: The National Guard is the lineal descendant of the State militias provided for in Article II, Section 8, Clause 16 of the Constitution--which gives to the Congress the power

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United

^{1/} Given the content of this relatively slim Title, it does not seem necessary to analyze it by chapter. Title 32 is divided into four: Chapter 1, Organization (32 U.S.C. 101-111); Chapter 3, Personnel (32 U.S.C. 301-333); Chapter 5, Training (32 U.S.C. 501-507); and Chapter 7, Service, Supply, and Procurement (32 U.S.C. 701-716).

States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

These local military forces, or militias, are organized, armed, and equipped in whole or in part at Federal expense; are subject to the oversight of the Secretary of the Army (for the Army National Guard) and the Secretary of the Air Force (for the Air Force National Guard); are available in times of peace to the governor of the State (or territory) for deployment within its borders, as needed to maintain law and order; but in time of war or national emergency, may be ordered into Federal service (i.e., "Federalized") by the President, in which event they become part of the United States armed forces.

The territorial application of Title 32 is unambiguous. National Guard units may exist in the States, the District of Columbia, Puerto Rico, and the "Territories", and the term "Territory" is defined at 32 U.S.C. 101(1) to mean

. . . any Territory organized after this title is enacted, so long as it remains a Territory. However, for purposes of this title and other laws relating to the militia, the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States, "Territory" includes Guam and the Virgin Islands.

Inasmuch as Title 32 was enacted into positive law in 1956, which was well after Guam and the Virgin Islands had been "organized" (in 1950 and 1936, respectively), the last sentence in the above quotation was necessary to avoid uncertainty as to the application of the title to them.

Army and Air National Guard units exist at this time in both Guam and the Virgin Islands.

Section 502(a)(2) of the Northern Marianas Covenant does not serve to extend the National Guard laws to that area, because such laws became applicable to Guam only in 1980 (by Public Law 96-600, approved December 24, 1980). Only laws applicable to Guam on January 9, 1978, are susceptible to extension under Section 502(a). There has been no interest evidenced to date in the Northern Marianas in obtaining a National Guard unit--to judge from information obtained from the National Guard Bureau and the Interior Department. In addition, the Northern Marianas Federal Laws Commission, while it did not study Title 32, stated, "No problems in the application of this title to the Northern Mariana Islands were brought to the Commission's attention" (Report, p. 497). Accordingly, it does not appear timely to recommend the extension to the Northern Marianas of the National Guard laws.

As for Samoa, there is not now authority for the creation of National Guard units there. If Samoa were to be made eligible, it would be necessary both to expand the definition of "Territory" at 32 U.S.C. 101(1), and probably also to amend the officer provision at 32 U.S.C. 313(b)--perhaps to include U.S. nationals as well as citizens. Given the frequency with which Federal laws require citizenship status for service in the armed forces (see Memoranda for Title 10), such a broadened definition may be viewed as inappropriate. So, until Samoa seeks seriously to be included within the laws associated with the National Guard--which it has not been heard to do to this time--there appears no need to undertake the extension of the National Guard laws to that territory. (The National Guard Bureau reports informally that Samoans have inquired from time to time in the past about the possibility of a National Guard unit there, but have at no time actively pressed the point.)

In a number of very minor particulars, the laws in Title 32 contain imprecisions as they relate to the territories. None of these imprecisions creates a known legal problem, or presents any other practical difficulty, so they can be overlooked with impunity. Nevertheless, in the interest of

careful draftsmanship, it will here be noted that when Title 32 is at some point revised to eliminate obsolescence or error (perhaps to excise the numerous references to the Canal Zone, which still appear in many sections), corrections could be made in the following:

- Many post-1956 amendments to Title 32, particularly ones enacted in the 1970's, use the term "territory" instead of the carefully-defined "Territory". See, for example, 32 U.S.C. 101(19), 304, and 504. Internal consistency could avoid an argument that "territory" includes Samoa, or others, because Samoa, and some others, generally fit that term.
- The oaths quoted at 32 U.S.C. 304 and 312 assume that National Guard units exist only in the States.
- Particular references to the Virgin Islands in 32 U.S.C. 109 might helpfully be removed, for they are redundant as to the Virgin Islands and could raise a question as to Guam, and potentially other areas.

Conclusion: Title 32 requires no modification to meet the needs of the territories to which it applies. Its extension to Samoa and the Northern Marianas should follow expressions of active interest from those areas. If it becomes easy to achieve, some shortcomings of draftsmanship in Title 32, outlined above might be corrected.

Federal agency comments: Comments were invited from the National Guard Bureau. All comments received have been reflected above.

Title 33 - NAVIGATION AND NAVIGABLE WATERS

- Contains nothing of substantial interest to the territories.
- * Contains matters of particular interest to the territories, but no legislative recommendations.
- ** Contains recommendations for changes in the law.
- (**) Contains recommendations for changes in the law, but the need for them is not urgent.

<u>Memorandum Number</u>	<u>Subject</u>	<u>33 U.S.C. sections</u>
33-1	* (a) Navigable Waters Generally * (b) Navigation Rules for Harbors, Rivers, and Inland Water Generally - (c) Regulations for the Suppression of Piracy - (d) Summary Trials for Certain Offenses Against Navigation Laws	1-59x 151-153 381-387 391-396
33-2	** Protection of Navigable Waters and of Harbor and River Improvements Generally	401-467n
33-3	- (a) Anchorage Grounds and Harbor Regulations Generally * (b) Bridges Over Navigable Waters * (c) River and Harbor Improvements Generally - (d) Mississippi River Commission - (e) California Debris Commission * (f) Flood Control - (g) Lighthouses * (h) National Ocean Survey	471-476 491-535i 540-633 641-652 661-687 701-709a 717-776 851-884
33-4	* Longshore and Harbor Workers Compensation	901-950
33-5	- (a) Saint Lawrence Seaway * (b) Sea Grant Colleges and Marine Science Development * (c) Vessel Bridge-Bridge Communica- tions	981-990 1101-1131i 1201-1208

Title 33
Contents

(**)	(d)	Ports and Waterways Safety Program	1221-1236
**	(e)	Water Pollution Prevention and Control	1251-1376
(**)	(f)	Ocean Dumping	1401-1445
*	(g)	Pollution Casualties on High Seas: United States Intervention	1471-1487
*	(h)	Deepwater Ports	1501-1524
**	(i)	International Regulations for Preventing Collisions at Sea	1601-1608
*	(j)	Ocean Pollution Research and Development and Monitoring Planning	1701-1709
-	(k)	Inland Waterways Trust Fund	1803-1804
*	(l)	Prevention of Pollution from Ships	1901-1911
-	(m)	Inland Navigational Rules	2001-2073
*	(n)	Artificial Reefs	2101-2106
*	(o)	Water Resources Development	2201-2311

- Subject: (a) Navigable Waters Generally
Title 33, Chapter 1 (33 U.S.C. 1-59x)
- (b) Navigation Rules for Harbors, Rivers, and Inland Waters Generally
Title 33, Chapter 3 (33 U.S.C. 151-153)
- (c) Regulations for the Suppression of Piracy
Title 33, Chapter 7 (33 U.S.C. 381-387)
- (d) Summary Trials for Certain Offenses Against Navigation
Title 33, Chapter 8 (33 U.S.C. 391-396)

Comment: The navigation laws discussed below, contained in the early chapters of Title 33, present no realistic problems for the territories. Some do not entirely comprehend them, but the laws in question are sufficiently archaic so that they do not now require legislative attention.

Discussion: (a) The first chapter of Title 33, entitled Navigable Waters Generally (33 U.S.C. 1-59x), contains only two sections of interest in this study, the remaining sections being concerned with particular rivers outside the territories. (These remaining sections for the most part declare such particular rivers to be nonnavigable, or make special provision for their use or administration.) Section 1, however, is of interest, because it vests in the Secretary of the Army the responsibility to prescribe regulations

for the use, administration, and navigation of the navigable waters of the United States . . . for the protection of life and property, or of operations of the United States in channel improvement . . . (33 U.S.C. 1).

The question is whether "navigable waters of the United States" includes navigable waters in the territories. The phrase includes not only navigable rivers, but also harbors

and tidewaters (State of Texas v. Chuoke, 154 F.2d 1 (1946)), so the matter is of clear interest in the territories.

Although some equivocation on the point has seemed necessary in the past, it is now correct to conclude that the phrase "navigable water of the United States" includes the navigable waters of the territories--for purposes of this section (33 U.S.C. 1) and others of Title 33, where the phrase is used but not expressly defined. Doubt has been expressed in the past because the navigation laws were expressly made applicable to the Virgin Islands by a section of the 1936 Organic Act (48 U.S.C. 1405c(b)), as they had earlier been to Puerto Rico (48 U.S.C. 749); and Alaska and Hawaii as Territories were each subject to provisions of their Organic Acts stating that Federal laws not locally inapplicable would apply to them. No comparable provisions have been enacted for Guam, Samoa, or the Northern Marianas. In this state of affairs, the Commission on the Application of Federal Laws to Guam in 1951 concluded that the navigation laws then applied to Guam, but that an express declaration by the Congress to that effect would be useful (H. Doc. 212, 82d Cong., pp. 6-7). On the same rationale, the Northern Marianas Federal Laws Commission recommended in 1985 that the Rivers and Harbors Act of 1899--which also uses the phrase "navigable waters of the United States" without defining it (see Memorandum No. 33-2)--should be made expressly applicable to the Northern Marianas by Act of Congress (Report, pp. 154-157).

Clarifying legislation does not appear necessary. There have been enough developments over the years to permit the conclusion that "navigable waters of the United States" include navigable waters in the territories, and thus that Federal navigation laws in general apply to the territories. In recent years, both of the Federal agencies that are principally concerned with "the navigable waters of the United States"--the Army Corps of Engineers and the Coast Guard--have regarded the term as including Guam, the Northern Marianas, and Samoa, and have carried out duties there. An early opinion of the Attorney General of the United States, in effect holding that the coastal waters, harbors and other navigable waters of Puerto Rico became "navigable waters of the United States" as an incident of U.S. sovereignty over Puerto Rico (23 Op. Atty Gen. 551 (1903)), is consistent with

this result. (But it is not wholly dispositive, given the provision of the 1900 Puerto Rican Organic Act that extended Federal Laws not locally inapplicable to Puerto Rico.) Similarly, the Interior Solicitor's Opinion that concluded that the United States held title to the tidelands and submerged lands of Guam (65 I.D. 193 (1957)) is also consistent with this result, citing common law authority for the proposition that the tidelands and navigable rivers and "arms of the sea" in Guam were all held in public trust by the national government.

More important are two Federal court decisions that make clear the application to Guam (and thus, by logical extension, Samoa and the Northern Marianas) of particular provisions of the Rivers and Harbors Act of 1899. In Re Pacific Far East Line, Inc. (314 F. Supp. 1339 (1970)) concerned a collision of two vessels at the entrance to Apra Harbor in Guam. The U.S. District Court for the Northern District of California held that

At all times material, Section 15 of the Rivers and Harbors Act (33 U.S.C. 409), applied to the navigable waters of Apra Harbor. (p. 1349)

(Section 15 provides that whenever a vessel is wrecked or sunk "in a navigable channel", it is the duty of the owner to remove the obstruction forthwith.) As support for the holding quoted, the court cited the Guam Commission Report (at page 1349).^{1/} Elsewhere in its opinion the court appears to have assumed without discussion the application of section 19 of the Rivers and Harbors Act (33 U.S.C. 414), as well as the application to Guam of several other laws turning on "navigable waters" that have since been repealed (formerly 33 U.S.C. 201, 203, 210, 221, 1078, 1091). The court referred as

^{1/} The court referred to the portion of the Report stating the Commission's view that the Rivers and Harbors Act applied to Guam (p. 21, item 129), but did not refer to that portion in which the Commission recommended clarifying legislation (p. 6, item 31).

well (at page 1344) to an administrative determination on January 9, 1963

by the Chief of the Army Corps of Engineers that the Corps had jurisdiction to exercise the functions delegated to it under the Rivers and Harbors Act in Guam Harbor.

Although the court did not so state, it seems probable that by now that administrative construction is sufficiently venerable to be entitled to the deference customarily accorded to long-held administrative constructions.

More recently, in Wolder v. U.S. (807 F.2d 1506 (1987)) the Ninth Circuit affirmed the decision of the District Court of Hawaii (613 F. Supp. 1139 (1985)) that the Corps of Engineers correctly acted to remove a wrecked vessel from Apra Harbor because it constituted an obstruction in the "navigable waters of the United States" under section 19 of the Rivers and Harbors Act (33 U.S.C. 414). Both the District Court and the Court of Appeals appear to have assumed without discussion the application of that section to Guam.^{2/}

Accordingly, the "navigable waters of the United States" include the navigable waters of the territories, and the territories are thus comprehended by the authority given the Secretary of the Army by 33 U.S.C. 1. The foregoing discussion compels that result in the case of Guam; American Samoa, being comparable to Guam in status (as an unincorporated territory of the United States), occupies the same position; by operation of section 502(a)(2) of the Covenant, pre-1978 laws applicable to Guam and the States apply to the Northern Marianas; and the matter is dealt with explicitly in the Virgin Islands Organic Act.

^{2/} A petition for reconsideration in Wolder v. U.S., was denied by the Ninth Circuit on May 7, 1987.

The other currently pertinent section of this chapter, at 33 U.S.C. 3, concerns a more limited subject, but the section is clearly applicable to the territories. The section empowers the Secretary of the Army to issue regulations for any portion of "the navigable waters of the United States or waters under the jurisdiction of the United States" that are, among other things, endangered by "Artillery fire in target practice or otherwise." Because the territories are all unquestionably "under the jurisdiction of the United States," their navigable waters are within the terms of this section. Further, the court jurisdiction provision includes them all, because it vests jurisdiction in the courts "in any Territory or other place subject to the jurisdiction of the United States."

(b) Navigation Rules for Harbors, Rivers, and Inland Waters Generally (33 U.S.C. 151-153) concerns two subjects: demarcation lines and towlines. The demarcation lines are to be established by the Coast Guard to divide the high seas from the harbors, rivers, and other inland waters "of the United States", a term defined for purposes of the section to include the Virgin Islands, Guam, Samoa, and the Northern Marianas by name (33 U.S.C. 151(c)). The Coast Guard is also required to limit the length of towlines (33 U.S.C. 152), and a cross reference to the definition just cited makes clear that the territories are comprehended.

(c) Regulations for the Suppression of Piracy (33 U.S.C. 381-387) date largely from 1819. It may be reasonable to conclude that they do not speak to a matter of current concern, and thus their uncertain application to the territories is probably academic. These laws permit the President to use U.S. armed vessels to protect vessels of the U.S. from piratical aggressions; to cause U.S. vessels to seize vessels that have committed piratical aggressions upon U.S. ships or U.S. citizens; and to bring such pirate ships into "any port of the United States". As has often been observed in this study, Samoans are for the most part not citizens but nationals of the United States; and a "port of the United States" is often used as a phrase of art, to denote ports within the U.S. customs area--and no port in the territories that are the subjects of this study are within the customs area. In sum, these piracy laws do not fit the territories in all particulars today, but the lack of a

perfect fit is unlikely to represent any real problem. It seems unnecessary now to amend these laws of 1819.

(d) The laws providing for Summary Trials for Certain Offenses Against Navigation Laws (33 U.S.C. 391-396) date largely from 1864. They pertain to complaints against officers or seamen on a vessel owned by "any citizens of the United States", concerning an offense "not capital or infamous, against any law of the United States made for the protection of persons or property engaged in commerce or navigation" (33 U.S.C. 391). Responsibility for prosecution is in the U.S. Attorney, and jurisdiction is in Federal courts. No problem arises in connection with the Virgin Islands, Guam, or the Northern Marianas, each of which has both a U.S. Attorney and a U.S. District Court. But the statute does not fit Samoa, which has neither. The deficiency does not appear to require correction, because Hawaii would probably provide a suitable site for proceedings otherwise pertinent to Samoa.

Conclusion: The navigation laws discussed herein require no change to meet the needs of the territories.

Federal agency comments: Comments were requested from the Army Corps of Engineers, the Coast Guard, and the Department of Justice. All comments received are reflected above.

Memorandum No. 33-2
April 1987

Subject: Protection of Navigable Waters and of Harbor and River Improvements Generally
(Including the Rivers and Harbors Act of 1899)
Title 33, Chapter 9 (33 U.S.C. 401-467n)

Purpose: To vest in the Army Corps of Engineers authority to control the creation of obstructions in navigable waters of the U.S. and otherwise to protect such waters, and to provide certain programs of Federal assistance for related activity.

Territorial Application: The authority vested in the Secretary of the Army and the Corps of Engineers by key sections of the Rivers and Harbors Act of 1899 extends to the Virgin Islands, Guam, Samoa, and the Northern Marianas. But a problem of court jurisdiction is presented in the case of Samoa. The programs of Federal aid in activities related to navigable waters apply in some instances to the territories, but it appears that in connection with the laws that do not, other means could be used to achieve approximately the same result. The dam inspection program does not extend to the territories, but this may present no current, practical problem.

Recommendation: The laws contained in Chapter 9 of Title 33 do not require modification to meet the needs of the territories, except that legislation would be desirable to vest in the High Court of Samoa jurisdiction over offenses under the Rivers and Harbors Act. Although other provisions in the chapter are imperfect in relation to the territories, they probably present no problems requiring correction at this time.

Discussion: Many provisions contained in Chapter 9 concern particular rivers or harbors only, and as such they are irrelevant for purposes of this study and will not be considered further here. The provisions of interest to the territories are discussed below under three categories: (1) The Rivers and Harbors Act, (2) Federal assistance, and (3) dam inspection.

(1) The Rivers and Harbors Act (more formally known as the Rivers and Harbors Appropriations Act of 1899) vests in

the Army Corps of Engineers authority to protect and to an extent control the "navigable waters of the United States." As will appear below, the key sections of the Act either use that phrase or a close equivalent to it. Although the term "navigable waters of the United States" is not defined for purposes of the Rivers and Harbors Act of 1899, no real doubt remains as to whether it includes the navigable waters of the territories. The current state of the law is discussed in Memorandum No. 33-1(a) and need not be repeated here, and on that basis it seems correct to conclude that the Rivers and Harbors Act of 1899 applies to the navigable waters of the Virgin Islands, Guam, Samoa, and the Northern Marianas. Although both the Federal Laws Commission for Guam in 1951, and for the Northern Marianas in 1985, recommended Federal legislation to confirm that application, such legislation is not now required.

The Act contains provisions of importance in the territories, making it unlawful

- To construct a bridge or dam "in any port . . . harbor . . . navigable river, or other navigable water of the United States" unless authorization from the Congress, the Secretary of Transportation, or the Secretary of the Army has been obtained (sec. 9, 33 U.S.C. 401);
- To construct any wharf, breakwater, or other structure in any navigable "water of the United States", or to excavate or fill in any such water, without an authorization from the Corps of Engineers and the Secretary of the Army (sec. 10, 33 U.S.C. 403);
- To engage in construction beyond established harbor lines, without authorization (sec. 11, 33 U.S.C. 404);

- To deposit refuse without permission "into any navigable water of the United States" (sec. 13, 33 U.S.C. 407);
- To use or alter any public work of the United States built "for the preservation and improvement of any of its navigable waters or to prevent floods" (sec. 14, 33 U.S.C. 408); and
- To obstruct a navigable channel, and if a vessel is wrecked and sunk in such a channel, the owner must remove it forthwith (sec. 15, 33 U.S.C. 409).

In addition,

- The Secretary of the Army may remove a sunken vessel when "navigable waters of the United States" are obstructed or otherwise endangered (sec. 19, 33 U.S.C. 414);
- In an emergency, he may do so without notice (sec. 20, 33 U.S.C. 415); and
- He may regulate the dumping of dredgings and other refuse when required "in the interest of navigation" (33 U.S.C. 419).

All of these activities may be performed by the Corps of Engineers in the navigable waters of the territories.

Because there are Federal District Courts in the Virgin Islands, Guam, and the Northern Marianas, enforcement of the foregoing provisions is available there in the same manner as in the States. Enforcement in Samoa is less clear, and in any event, less tidy. Under 33 U.S.C. 406, jurisdiction to enforce the provisions of 33 U.S.C. 401, 403, and 404 (discussed above) is given to "the court," without elabora-

tion, so that the High Court of American Samoa might be included. But a further provision of that section permits an injunction requiring the removal of an impediment to navigation only if it is issued by the "district court" where the impediment exists, with proceedings conducted "under the direction of the Attorney General of the United States." No court in Samoa could meet those terms. Again, under 33 U.S.C. 411, jurisdiction to enforce the provisions of 33 U.S.C. 407, 408, and 409 (discussed above) is given to "the court," but companion sections (33 U.S.C. 412 and 413) refer to the "district court," the Department of Justice, and U.S. Attorneys, so again no court in Samoa could qualify. Circumstances in a given case could cause a Federal court in Hawaii or elsewhere to have jurisdiction, but it would be preferable to deal with the matter directly, by legislation giving to the High Court of American Samoa the same jurisdiction that the Act vests in Federal district courts.

(2) Federal assistance in certain matters concerning navigable waters is provided in several sections contained in Chapter 9 of Title 33.

- Under 33 U.S.C. 426, the Army Chief of Engineers is authorized to investigate and study erosion of the shores of coasts, and to devise corrective measures, in cooperation with "appropriate agencies" of the States and "the possessions of the United States." The law was originally enacted in 1930, so by section 502(a)(2) of the Covenant it applies to the Northern Marianas, as well as to the Virgin Islands, Guam, and Samoa. The further investigative authority appearing at 33 U.S.C. 426a (enacted in 1945), pertaining to erosion of "shores" (therein defined to include the Pacific) by waves and currents, has the same geographic reach.
- A Federal financial aid program "for the restoration and protection against erosion, by waves and currents, of the shores of the United States," extends to "the Territories and possessions" (33 U.S.C. 426e(a)). All of the current territories are eligible under this 1946 program, and the law

accords them the same treatment as the States--although a territory might obtain a waiver of the matching requirement under the general law pertaining to such waivers (48 U.S.C. 1469a(d)).

- The territories would qualify as sites for "small shore and beach restoration and protection projects" under 33 U.S.C. 426g. (The Catalog of Federal Domestic Assistance for 1986 does not name the territories as eligible (12.101 CFDA and the Applicant Index at AEI-4), but this appears to be in error, because those eligible under 33 U.S.C. 426e, which expressly includes the "Territories and possessions," are also eligible under 33 U.S.C. 426g, by cross reference.)

- The Federal program of assistance to the States for the removal of drift and debris from public harbors and adjacent areas (33 U.S.C. 426m) is confined to the States--or a municipality or political subdivision. The law provides that one-third of the cost is born by "the State, municipality, or other political subdivision," and two-thirds by the United States. The territories are not included in these terms. (They are not "municipalities," nor are they "other political subdivisions" of a State.) None is known to have sought the kind of assistance contemplated by 33 U.S.C. 426m--although they probably experience drift and debris problems similar to those of the States. It seems probable, however, that the technical assistance authority given the Secretary of the Interior for the territories by 48 U.S.C. 1469d(a) could serve as a vehicle for obtaining Corps of Engineers' assistance on particular drift or debris removal projects in the territories. That authority is sufficiently broad to permit whatever local financial participation would be acceptable to the Corps and the territorial government--including none. On that basis, modification of the law is not necessary, although if a particular territorial need is presented, an amendment to the law would obviously be appropriate.

- The 1986 technical assistance program, which authorizes the Secretary of the Army, at the request of the "Governor of a State, or the appropriate official of local government," to provide assistance in connection with projects for removing debris from navigable streams and straightening them, or for renovating streams (33 U.S.C. 426n) also does not apply to the territories. But without doubt the Secretary of the Interior's technical assistance authority (48 U.S.C. 1469d(a)) could be used to achieve the same result. A change in the law is not necessary.

(3) The dam inspection program (33 U.S.C. 467-467n), initially enacted in 1972, requires the Chief of Engineers to carry out a "national program" of dam inspection. With exceptions not now pertinent, he is to inspect all "dams in the United States," for the purpose of protecting human life and property (33 U.S.C. 467a). The quoted phrases would, without more, include the territories, for they are a part of the "nation" and usually part of the "United States." But many other provisions of the law refer solely to the States, and the program of Federal financial aid for dam safety, added in 1986 (33 U.S.C. 467f) is unambiguously confined to the States. (The readily available legislative history of the 1972 Act sheds no light on the uncertain geographic reach of the original legislation (1972 U.S. Code Cong. and Adm. News 2916)). It may be that the size of the dams subject to the Act is such that there are none in the present territories: the term is defined to mean a dam of at least 25 feet in height, or one capable of impounding at least fifty acre-feet of water (33 U.S.C. 467). One can be sure, in any event, that there are very few such sizeable dams in the territories. It seems probable, therefore, that if there is a need in any of the territories for this inspection, or for fiscal assistance in a safety program, that need could be met by the appropriate use of the technical assistance authority appearing at 48 U.S.C. 1469d(a). In the absence of a showing of actual need, no change in the law is required.

Conclusion: The provisions of the Rivers and Harbors Act of 1899 pertaining to court jurisdiction for enforcement of the Act

should be amended to make suitable provision for jurisdiction in American Samoa. Two Federal aid programs--for drift and debris removal, and for dam inspection--appear not to require amendment, because though inapplicable to the territories, their purposes could be achieved through other means. If, however, there is a showing on the part of any territory of a need for either program that cannot otherwise be met, then such law should be amended to apply to them.

Federal agency comments: Comments were requested from the Army Corps of Engineers, and the Department of Justice. All comments received have been reflected above.

- Subject:
- (a) Anchorage Grounds and Harbor Regulations Generally
Title 33, Chapter 10 (33 U.S.C. 471-476)
 - (b) Bridges Over Navigable Waters
Title 33, Chapter 11 (33 U.S.C. 491-535i)
 - (c) River and Harbor Improvements Generally
Title 33, Chapter 12 (33 U.S.C. 540-633)
 - (d) Mississippi River Commission
Title 33, Chapter 13 (33 U.S.C. 641-652)
 - (e) California Debris Commission
Title 33, Chapter 14 (33 U.S.C. 661-687)
 - (f) Flood Control
Title 33, Chapter 15 (33 U.S.C. 701-709a)
 - (g) Lighthouses
Title 33, Chapter 16 (33 U.S.C. 717-776)
 - (h) National Ocean Survey
Title 33, Chapter 17 (33 U.S.C. 851-884)

Comment: The chapters of Title 33 discussed herein do not appear to present problems of likely concern to the territories, although the laws pertaining to court jurisdiction in Samoa as to bridges, and to the eradication of obnoxious aquatic plants in the territories generally--if there is a showing of need--may require modification to meet such need.

Discussion: (a) The chapter entitled Anchorage Grounds and Harbor Regulations Generally (33 U.S.C. 471-476) authorizes the Secretary of Transportation, when maritime or commercial interests warrant it, to establish anchorage grounds in "harbors, rivers, bays, and other navigable waters of the United States" (33 U.S.C. 471). The authority extends to the territories, in light of the reasoning set forth in Memorandum No. 33-1(a) in support of the proposition that the navigable waters of the territories are included in the phrase "navigable waters of the United States".

(b) Bridges over Navigable Waters (33 U.S.C. 491-535i) concern four subjects, none of which presents a difficulty for the territories except for court jurisdiction problems in American Samoa. It is probable that such bridges as exist over navigable waters in Samoa are sufficiently modest so that this shortcoming does not require attention.

-- The early sections of the chapter contain the Bridge Act of 1906, which requires that a bridge "across or over any of the navigable waters of the United States" (33 U.S.C. 491) be constructed in accordance with plans approved by the Secretary of Transportation. The Secretary may require alterations, if after erection the bridge obstructs navigation (33 U.S.C. 494). The law applies to bridges over navigable waters in the territories, and there are in fact some such bridges. (But provisions concerning toll bridges and drawbridges may be ignored, for there are none of those.) The enforcement provisions would be workable in the territories (33 U.S.C. 495), except for Samoa which has no Federal court--but even in Samoa fines could be levied, for that is within the jurisdiction of "any court of competent jurisdiction", so the High Court of Samoa would qualify, although equitable remedies would not be available because they are confined to Federal district courts (33 U.S.C. 495(a)).

-- Sections concerning the alteration of bridges (33 U.S.C. 511-524) apply to the territories, not only because they concern "navigable waters of the United States" (33 U.S.C. 512), but also because "United States" is defined to include the Territories and possessions (33 U.S.C. 511). Again, however, the court jurisdiction provisions are deficient as to Samoa (33 U.S.C. 519, 520). It seems reasonable to suppose that this poses no practical difficulty to the Coast Guard, as the enforcing agency.

-- The sections titled "General Bridge Authority", derived from the General Bridge Act of 1946 (33 U.S.C. 525-534), are also generally applicable to the territories because they are concerned with the "navigable waters of the United States" (33 U.S.C. 525(a)), although internal references to the "States", without more, suggest the contrary. Once again the enforcement provisions do not fully accommodate Samoa, but

to the extent that administrative remedies are used, they would be available with respect to transgressions in Samoa (33 U.S.C. 533).

-- Provisions concerning International Bridges (33 U.S.C. 535-435i) are irrelevant, the art of bridge building having not advanced sufficiently to make them otherwise.

(c) The chapter entitled River and Harbor Improvements Generally (33 U.S.C. 540-633) contains for the most part laws concerning housekeeping in the Corps of Engineers, and laws pertaining to particular projects. Three sections, however, warrant mention here:

-- 33 U.S.C. 577 authorizes the construction of "small river and harbor improvement projects . . . which will result in substantial benefits to navigation", with a "small" project being defined as one costing no more than \$4 million (33 U.S.C. 577(b)). No bar appears in the section, which dates from 1960, to such projects in the territories.

-- 33 U.S.C. 598 contains an authorization for assistance to a "State" or political subdivision of a State in carrying out a project to resettle people or businesses displaced as a result of river, harbor, or flood control projects. The territories appear to be excluded from this authorization, but none has yet been the site of a project of sufficient scope to require resettlement, and none seems likely, at least in the short run, to do so.

-- 33 U.S.C. 610 authorizes a program of Federal assistance, in cooperation with "State agencies", to control and eradicate "obnoxious aquatic plant growth, from the navigable waters . . . of the United States". The reference to "State agencies" would exclude the territories; the reference to navigable waters would include them. If waters in the territories suffer from "obnoxious plants", clarification would be helpful--but in the absence of a showing that they do, a change is not necessary.

(d) The Mississippi River Commission (33 U.S.C. 641-652) is irrelevant for purposes of this study.

(e) The same is true of the California Debris Commission (33 U.S.C. 661-687).

(f) The many laws codified under Flood Control (33 U.S.C. 701-709a), including the Flood Control Acts of 1936 and 1944, are, with two exceptions discussed below, of arguable application to the territories. With those exceptions, they carry no provision as to their geographic reach. On the one hand, they refer frequently to the navigable waters of the United States, but also frequently to the "States", unadorned --sometimes within the same section (33 U.S.C. 701-1)--so the beginning of the argument as to application, either way, is presented. But the legislation is, of course, directed at the devastating floods known well in the continental United States, caused by overflowing rivers, and a similar phenomenon, actual or potential, does not exist in the territories. The 1936 Act, for example, refers to "destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways,...and other channels of commerce" (33 U.S.C. 701a). In the circumstances, it is reasonable to suppose that the flood control acts codified here were not intended to apply to the territories. Special legislation, tailored to whatever peculiar territorial problem needs to be met, would represent a course wiser than attempting to fit the territories into these general laws. Soil erosion is a territorial problem, but that is a principal responsibility not of the Corps of Engineers but of the Agriculture Department, which has ample authority under its general territorial authorization to act in the territories when the occasion warrants (48 U.S.C. 1469d(c)).

One provision of law that appears here, and that does extend to all of the current territories, allows the Secretary of the Army to construct a well for, or to transport water to, "any farmer, rancher, or political subdivision within a distressed area" who seeks it in writing--with a "distressed area" defined as one found by the Secretary to be a threat to health

and welfare owing to a drought (33 U.S.C. 702n(b)). The cost of the well construction must be reimbursed. The "farmer, rancher, or political subdivision" may be in Guam, American Samoa, or the Virgin Islands (33 U.S.C. 701n(b)(5)(F)), and by operation of law under section 502(a)(2) of the Covenant, in the Northern Marianas.

A more important provision that applies to the territories--and is in fact being applied there by the Army Corps of Engineers--appears at 33 U.S.C. 701r, by which the Secretary of the Army is authorized to expend funds

for the construction, repair, restoration, and modification of emergency streambank and shoreline protection works to prevent damage to highways, bridge approaches, and public works, churches, hospitals, schools, and other nonprofit public services. . . .

This language is derived from the Flood Control Act of 1946. Other sections of the 1946 Act, not codified, authorized a project for Alaska, which was then a Territory (sec. 10, 60 Stat. 651), and authorized preliminary examinations and surveys for flood control "in drainage areas of the United States including its Territorial possessions" (sec. 11, 60 Stat. 651). It seems reasonable to suppose that the phrase "Territorial possessions," which would include the Virgin Islands, Guam, Samoa, and the Northern Marianas, was intended to apply generally throughout the Act, although that is nowhere expressly provided. In any event, the pertinent agency (the Corps of Engineers) so construes 33 U.S.C. 701r, and that would seem to be sufficient.

(g) The remaining laws on the subject of Lighthouses (33 U.S.C. 717-776) are few, and they pertain largely to personnel matters of the Lighthouse Service. The only provisions of interest--and only of academic interest--to the territories are two that derive from aged laws and that pertain to U.S. jurisdiction over lighthouse sites: 33 U.S.C. 727 (1821), which provides that a lighthouse cannot be built until there has been a "cession of jurisdiction" of the site

to the U.S.; and 33 U.S.C. 728 (1795), permitting State process to be served within the ceded site. The concept of exclusive (or concurrent) Federal jurisdiction is logically inapplicable in the territories, because they are not "sovereign" in the manner of the States, and thus have nothing to cede to the U.S. In any event, the modern authority of the Coast Guard to construct aids to navigation .e.g., 14 U.S.C. 81) extends to the territories, and that is sufficient.

(h) The chapter entitled National Ocean Survey (33 U.S.C. 851-884) contains laws pertaining to the National Oceanic and Atmospheric Administration (successor to, among others, the Coast and Geodetic Survey, which formerly occupied this chapter). Most pertain to personnel and other housekeeping matters (but it should be noted that there is no citizenship requirement contained in the chapter for officers of NOAA). But a few sections pertain to the authority of the agency, and that authority comprehends the territories: aeronautical and nautical charts may include "the Territories and possessions" (33 U.S.C. 883b); and surveys and investigations may be undertaken in cooperation with "any State or subdivision thereof, any Federal agency, or any public or private organization" (33 U.S.C. 883e). Although the territories are unmentioned in the latter, should they be interested in doing so, they could probably qualify as "public organizations". Equally, any survey or investigation that is needed could probably qualify as technical assistance to the territory, available under 48 U.S.C. 1469d(a).

Conclusion: The laws contained in the chapters of Title 33 discussed above hold little of interest for the territories, and generally accommodate them to the extent necessary. But if it were to be shown that bridges in Samoa are in fact a problem to navigation ((b) above) or that obnoxious aquatic plants need attention in any of territories ((c) above), then legislative correction to meet these problems would be desirable.

Federal agency comments: Comments were requested from the Corps of Engineers, the Coast Guard and the Department of Justice. All comments received, particularly those of the Corps of

Memorandum No. 33-3

Engineers, have been reflected above. The Coast Guard, however, did not respond.

Memorandum No. 33-4
April 1987
Revised June 1993

Subject: Longshore and Harbor Workers' Compensation
Title 33, Chapter 18 (33 U.S.C. 901-950)

Purpose: To provide for the payment of compensation by the employer for the disability or death of an employee resulting from an injury to the employee occurring on the navigable waters of the United States, including any adjoining pier or other adjoining area customarily used in loading, unloading, repairing, dismantling, or building a vessel.

Territorial application: Because the Longshore and Harbor Workers' Compensation Act has been held inapplicable to Puerto Rico, it is probably not applicable to the Virgin Islands, Guam, American Samoa, or the Northern Marianas.^{1/}

Recommendation: Because compensation for injury or death to longshoremen and harbor workers can be paid, and has been paid, under workers' compensation laws enacted in the territories, coverage of such workers under the Federal law is not essential. It is probable that the territories would prefer to deal with the matter by their own local legislation, rather than by means of Federal legislation applying the Longshore and Harbor Workers' Compensation Act to them.^{2/}

Discussion: Substance of the statute - The Longshore and Harbor Workers' Compensation Act (until recently known as the "Longshoremen's and Harbor Workers' Compensation Act") was enacted in 1927 to provide compensation for injury or death to maritime workers on "navigable waters of the United States" who, because of Federal jurisdiction over such waters, could

^{1/} This conclusion, apparently correct when this memorandum was written in 1987, may have become incorrect in 1991. See the Addendum, June 1993, that appears at the end of this memorandum.

^{2/} For a modified Recommendation, see the concluding portion of the Addendum, June 1993, that appears at the end of this memorandum.

not be compensated under State workmen's compensation laws. The employer is liable for payment of the required compensation, and the amount of compensation--which is stipulated in the statute--is dependent upon the nature of the injury. In the manner of workmen's compensation laws generally, certain common law defenses--such as contributory negligence and assumption of the risk--are barred.

The Act provides for compensation payments for disability or death of an employee

if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel). (33 U.S.C. 903(a))

The term "navigable waters" is not defined, but the "United States"

when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof. (33 U.S.C. 902(9))

And the term "State"

includes a Territory and the District of Columbia. (33 U.S.C. 902(8))

Application of the Act to Puerto Rico - In a series of decisions, culminating in 1979 in Garcia v. Friesecke (597 F.2d. 284, cert. denied 444 U.S. 940 (1979)), the U.S. Court of Appeals for the First Circuit has held that the Longshore

and Harbor Worker's Compensation Act is inapplicable to Puerto Rico--and thus that Puerto Rico may enact its own legislation inconsistent with Federal law. For immediate purposes, it seems correct to state that the court based that conclusion on three considerations: First, by the Puerto Rican Organic Act of 1917, Congress conferred upon the Puerto Rican legislature authority over the "harbor areas and navigable streams . . . in and around the island of Puerto Rico" (48 U.S.C. 749); second, it gave to Puerto Rico the power to legislate on local matters; and third, it intended to confer upon Puerto Rico full powers of self-government. If those three considerations applied equally to the Virgin Islands, Guam, Samoa, and the Northern Marianas, then Garcia would be dispositive and the inapplicability of the Act to those areas would be clear.

But that is not the case. The first basis--i.e., the transfer of jurisdiction over navigable waters--has not occurred with respect to any other offshore area. By section 8 of the 1917 Organic Act (now the Puerto Rican Federal Relations Act, 48 U.S.C. 749) the Congress provided

That the harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Puerto Rico . . . owned by the United States and not reserved by the United States for public purposes, are placed under the control of the government of Puerto Rico, to be administered in the same manner and subject to the same limitations as the property enumerated in [section 7 of this Act]. (939 Stat. 954)

Section 7 transferred administration of other property to Puerto Rico, including "unnavigable streams," and placed such property

under the control of the government of Puerto Rico, to be administered for the benefit of the people of Puerto Rico; and the Legislature of Puerto Rico shall have authority, subject

to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable. (39 Stat. 954; 48 U.S.C. 747)

Section 8 further provided

That all laws of the United States for the protection and improvement of the navigable waters of the United States and the preservation of the interests of navigation and commerce . . . shall apply to said island and waters

The Congress has not taken similar action with respect to the four territories now before us--except that in the case of the Virgin Islands, the 1936 Organic Act did provide that

. . . all laws of the United States for the protection and improvement of the navigable waters of the United States shall apply to the Virgin Islands. (48 U.S.C 1405c(b))

The remaining two bases of the Garcia decision do apply to the four territories. The authority possessed by the four local legislatures is similar to, although not precisely the same as, that conferred upon Puerto Rico, viz,

-- In Puerto Rico, the legislative power extends "to all matters of a legislative character not locally inapplicable" (48 U.S.C. 821);

-- In the Virgin Islands, under the 1954 Organic Act, legislative power extends "to all rightful subjects of legislation not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands" (48 U.S.C. 1574(a));

-- In Guam, under the 1950 Organic Act, the legislative power extends to "all subjects of legislation of local application not inconsistent with the provisions of this Act and the laws of the United States applicable to Guam" (48 U.S.C. 1423a);

-- In American Samoa, under Article II, Section 1 of the Constitution (which Constitution is not a Federal law, but it was approved by the Secretary of the Interior pursuant to his authority under 48 U.S.C. 1661(c) and Executive Order No. 10264, and by 48 U.S.C. 1662a it may now be amended only by Act of Congress), the Legislature has "authority to pass legislation with respect to subjects of local application", except that legislation must be consistent with the Constitution of Samoa and with Federal laws applicable to Samoa (and other exceptions not now pertinent); and

-- In the Northern Marianas, under Article II, Section 1 of its Constitution (approved by the President pursuant to section 202 of the Northern Marianas Covenant), the legislative authority extends to "all rightful subjects of legislation."

The words used in the basic charters differ, but their import is the same for purposes of the current question.

As to the Congress' purpose in providing local governments in the territories, it does not differ from that quoted by the Garcia court as the motive for the Organic Act of Puerto Rico:

. . . that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain principles established by Congress. (at p. 290)

And further:

Only the plainly expressed will of the United States is to prevail against the presumption of local control over matters of local concern (at pp. 290-291).

In sum, the reasoning that has led to the conclusion that the Act does not apply to Puerto Rico leads--largely, but not entirely--to the same conclusion in the four territories here involved.

Application of the Act to the territories - There has been no litigation as to the application of the Longshore and Harbor Workers' Compensation Act to the Virgin Islands, Guam, Samoa, or the Northern Marianas. The U.S. Labor Department, as the agency responsible for administration of the Act, has reportedly not taken a definitive position on the question whether the Act applies to any of them.^{3/}

In 1951 the matter was considered by the Commission on the Application of Federal Laws to Guam, which concluded that the Act did not then apply to Guam and that it should not be extended to Guam (H. Doc. 212, 82d Cong., p. 31). The Resource Material used by the Commission, published in 1952 as a House Interior Committee Print, explains (at pages 181-183) that the conclusion was based on an administrative construction by the Labor Department that "Territory" meant the incorporated territories of Alaska and Hawaii; on a

^{3/} This information from the Labor Department in 1987 was and is incorrect. In a legal opinion dated May 27, 1946, the Acting Counsel for the United States Employment Commission concluded that the Longshoremen's and Harbor Workers' Compensation Act did not apply to the Virgin Islands because "navigable waters in that area are not navigable waters 'of the United States' within the meaning of the Act." That position was affirmed by the Labor Department in 1966 in LS/HW Program Memorandum No. 24, in which the foregoing quotation appears.

decision of the First Circuit before enactment of the Act, holding that Puerto Rico's own workmen's compensation law applied to maritime workers there in light of the transfer of administration over navigable waters contained in the 1917 Organic Act (Lastra v. N.Y. & P.R. S.S. Co., 2 F.2d 812 (1924)); and on informal advice from the Labor Department that extension of the Act to Guam was not then timely, based on the small number of employees that might then be affected.

(The Commission on the Application of Federal Laws to the Northern Marianas did not consider the Longshore and Harbor Workers' Compensation Act. Unpublished and unedited research of its staff concluded that the Act now applies to the Northern Marianas and ought to continue to do so, but the basis for the legal conclusion is faulty: (1) It is stated that the term "Territory" now includes Guam, because Guam has become a "territory" since the Guam Commission Report in 1951 (but Guam's status has not changed since 1950, before the Report, and while it is unquestionably a "territory," it may not be a "Territory" for purposes of this Act--as discussed further below); and (2) it is also stated that regulations "pertinent" to the Act "suggest" that it applies to Guam, and thus by operation of section 502(a)(2) of the Covenant, to the Northern Marianas. (But pertinent regulations do not mention the territories, and those cited in the research relate instead to the Coal Mine Health and Safety Act, 20 CFR 722.102(a)(6) and 725.101(a)(5)). The policy recommendation that the Act apply to the Northern Marianas is based on the view that the objective of the Act is sound and that maritime workers in the Northern Marianas ought to be protected as are "similar workers elsewhere in the American political system.")

A further argument against the application of the Act to the territories arises from the definitions, quoted above, of "United States" and "State." In each case, the term "Territory"--not "territory" or "possession"--appears. As to this, the Garcia court stated:

The term "territory" does not have a fixed and technical meaning accorded to it in all circumstances, and thus Puerto Rico may be found to be

included within one act whose coverage extends to territories of the United States and excluded from another. (597 F.2d 284, 293)

The proposition is unarguably correct (although one wishes the court had referred to the upper-case "Territory," as does the Act and the quotation from it appearing in the court's footnote (at page 293), because that can convey a hint as to the Congress' intent.)

Historically the term "Territory" has been used by the Congress to refer to incorporated territories (the shorthand for which is "Territories"); with the term "possessions" being used in addition, when offshore areas, including such unincorporated territories as the four here involved, are also intended to be comprehended. In recent decades, the term "territories"--which is generic, and which comprehends all non-State areas over which the U.S. exercises sovereignty--has come into vogue with legislative draftsmen, probably because "possessions" has been felt to carry ugly connotations. (Fashions in legislative style with respect to offshore areas are illustrated by the organizational charters considered in Memorandum No. 36-1.)

When the Longshore and Harbor Workers' Compensation Act was enacted in 1927, the U.S. had two incorporated territories--Alaska and Hawaii--and numerous unincorporated territories, including Puerto Rico, the Virgin Islands, Guam, and Samoa (but not the Northern Marianas). Given what was then standard practice, it can be supposed that by "Territory" the Congress meant to refer to Alaska and Hawaii. It did not mean to refer to the then organized but unincorporated territory of Puerto Rico--and the courts have so held. That being so, it seems unreasonable to suppose that Congress intended by the term "Territory" to include other offshore areas, all of which then occupied a lesser political status than Puerto Rico. That is, in 1927 the Virgin Islands, Guam and Samoa--then commonly called "possessions"--were at most unincorporated territories of the United States, but they were not then "organized" (that is, they were not the subjects of Organic Acts). The Virgin Islands became an "organized" territory in 1936, Guam in 1950.

Samoa is not yet "organized" through an Organic Act. Although there has been no occasion yet to turn to the question, it is probable that the Northern Marianas is not "organized" either, its basic charter having been locally drafted and approved, and not enacted by the Congress, but it has been a "territory" (obviously unincorporated) of the United States since trusteeship termination on November 3, 1986.

The legislative history of the 1927 Act is reportedly silent as to the meaning of "Territory" and as to the application of the Act to offshore areas, other than an incorporated "Territory." The same is true as to the major amendments to the Act enacted in 1972.

Given the customary language in Federal laws pertaining to offshore areas, it should not be supposed that the Congress intended in 1927 that the Act apply to the territories that are the subjects of this study.

The Virgin Islands, Guam, and Samoa all have local workmen's compensation laws. (The Northern Marianas does not.) Nothing in them suggests the exclusion of longshore or harbor workers from the protection of these local laws, and at least since 1951 in the Virgin Islands, such workers have received compensation benefits under the local law. (Research Material for the Guam Commission so reports.) Given the presumption that the Congress intended to give to the territories "local control over matters of local concern" (Lastra, 2 F.2d at 815), and given the territories' current policy preference in favor of such local control, it seems appropriate to conclude that the application of the Longshore and Harbor Workers' Compensation Act should not be changed.

Conclusion: Although arguable, it seems likely that the Longshore and Harbor Workers' Compensation Act does not apply to the Virgin Islands, Guam, American Samoa, or the Northern Marianas. No modification of the law is required.^{4/}

^{4/} This conclusion is at least in part incorrect. See the Addendum, June 1993.

Federal agency comment: Comments were requested from the Department of Labor and the Department of Justice. The Department of Labor's Solicitor's Office did not respond.

Addendum, June 1993: The foregoing was written some years before the decision of the Third Circuit in Peter v. Hess, 903 F.2d 935, reh. den. 910 F.2d 1179 (1990). In that decision, the court on rehearing recommended that the Department of Labor, which had not been a party to the litigation, clarify its position concerning the application of the Longshore Act to the Virgin Islands. The Labor Department did so on March 12, 1991, in LHWCA Program Memorandum No. 62. After stating the Labor Department's position since 1946 to have been that the Act did not apply to the Virgin Islands, and after referring to Program Memorandum No. 24 (see footnote 3), the Memorandum continues:

Review of this issue in light of the Peter decision has convinced the Office that the former policy is not correct. The Virgin Islands has been a territory of the United States since 1954 and, therefore, comes within the definition of United States set forth at section 2(9) of the Longshore Act: "The term 'United States' when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof." Based on the same analysis, the Third Circuit wrote (910 F.2d at 1180):

The plain language of LHWCA, 33 U.S.C. 903(a), 902(8), (9), extends the Act's coverage to the waters of United States territories. The Virgin Islands are a territory of the United States.

In order to eliminate any confusion concerning this issue, we hereby rescind Program

Memorandum No. 24 and declare, consistent with the language of section 2(9) of the Act, that the Longshore Act applies to the Virgin Islands and its territorial waters. Therefore, all covered employers in the Virgin Islands must secure the payment of compensation as required by sections 4 and 32, and comply with the other obligations imposed by the Act and its governing regulations.

It is doubtful whether the "confusion concerning this issue" has in fact been eliminated by Program Memorandum No. 62. As earlier noted in this memorandum, the "plain language" of the Act extends it to "Territories," not to "territories," and courts have sometimes paid deference to the difference. (The Virgin Islands has been a "territory" since well before the 1954 date stated in Program Memorandum No. 62, having arguably achieved that status in 1917 upon its purchase from Denmark, and surely by 1936 upon enactment of its first Organic Act.) It might also be noted that, notwithstanding its reference to "plain language" and its result, quoted above, the court also said that "we expressly decline to express an opinion on whether LHWCA covers the territorial waters of the Virgin Islands . . ." (f.n. 2 of p. 1180).

But taking Program Memorandum No. 62 at face value, its conclusion that the Act applies to the Virgin Islands compels the same conclusion in the case of Guam, whose status is in all material particulars the same. Whether the same result would be reached in Samoa, whose political status (described above) differs, is by no means certain. The words of Program Memorandum No. 62 do not closely apply to it. If the Act applies to Guam, then it could be expected to apply to the Northern Marianas by operation of section 502(a)(2) of the Covenant, but given recent resistance in important quarters in the Northern Marianas to its categorization as a "territory," this result is unlikely to be accepted without strenuous argument.

Recommendation and Conclusion Revisited: It should be clear from the foregoing that the application of the Longshore and Harbor Workers' Compensation Act to the Virgin Islands, Guam, Samoa,

and the Northern Marianas, is unsettled--notwithstanding the Labor Department's effort to cause it to be unambiguously applicable to the Virgin Islands. Because the matter is important, and because litigation will almost certainly follow, perhaps eventually in all of these areas, the matter should be attended to by new legislation. Given the strong employer-employee interests that are always involved in legislation touching this subject, any amendment to the Act, either way, will be controversial and difficult to achieve. Consistent with the position taken in this study when legislative solutions are of that sort, no recommendation is offered here. Once again, it could prove valueless. But the question should not be ignored, and when informed policy positions have been developed within the Executive Branch and in the territorial governments, a legislative solution should be sought.

Memorandum No. 33-5
May 1987
Revised October 1987

- Subject:
- (a) Saint Lawrence Seaway
Title 33, Chapter 19 (33 U.S.C. 981-990)
 - (b) Sea Grant Colleges and Marine Science Development
Title 33, Chapter 22 (33 U.S.C. 1101-1131)
 - (c) Vessel Bridge-to-Bridge Communications
Title 33, Chapter 24 (33 U.S.C. 1201-1208)
 - (d) Ports and Waterways Safety Program
Title 33, Chapter 25 (33 U.S.C. 1221-1236)
 - (e) Water Pollution Prevention and Control
Title 33, Chapter 26 (33 U.S.C. 1251-1376)
 - (f) Ocean Dumping
Title 33, Chapter 27 (33 U.S.C. 1401-1445)
 - (g) Pollution Casualties on High Seas; United States
Intervention
Title 33, Chapter 28 (33 U.S.C. 1471-1487)
 - (h) Deepwater Ports
Title 33, Chapter 29 (33 U.S.C. 1501-1524)
 - (i) International Regulations for Preventing Collisions
at Sea
Title 33, Chapter 31 (33 U.S.C. 1601-1608)
 - (j) Ocean Pollution Research and Development and
Monitoring Planning
Title 33, Chapter 31 (33 U.S.C. 1701-1709)
 - (k) Inland Waterways Trust Fund
Title 33, Chapter 32 (33 U.S.C. 1803-1804)
 - (l) Prevention of Pollution from Ships
Title 33, Chapter 33 (33 U.S.C. 1901-1911)
 - (m) Inland Navigational Rules
Title 33, Chapter 34 (U.S.C. 2001-2073)
 - (n) Artificial Reefs
Title 33, Chapter 35 (33 U.S.C. 2101-2106)

(o) Water Resources Development
Title 33, Chapter 36 (33 U.S.C. 2201-2311)

Comment: Most of the laws in Title 33 considered in this memorandum represent subjects of considerable interest to the territories, each of which has a special concern for navigation and for water use and development. In all important particulars the needs of the territories appear to be adequately reflected in these laws. The exceptions relate to matters concerning court jurisdiction in Samoa and to other perfecting changes that would be desirable.

Discussion: (a) The Saint Lawrence Seaway (33 U.S.C. 981-990) is irrelevant for purposes of this study.

(b) The chapter entitled Sea Grant Colleges and Marine Science Development (33 U.S.C. 1101-1131) contains two programs, both of which concern a subject of special interest to the territories, and both of which extend to them. The first (referred to as the Marine Resources and Engineering Development Act of 1966) is a program for the development and coordination within the Federal Government of a "national program in marine science", for the purposes, among others, of "enhancement of commerce" and "rehabilitation of our commercial fisheries" (33 U.S.C. 1101(a)). No geographic limitations appear; and the single reference to the "States" is not limiting, because it permits cooperation in marine science activities "with such non-Federal organizations as States, institutions and industry" (33 U.S.C. 1103(a)(2)). Territorial governments or institutions are not excluded by that language.

The second program, contained in the National Sea Grant College Program Act, authorizes Federal financial grants to individuals or to "sea grant" colleges, or fellowships to individuals, to promote the development and conservation "of the Nation's ocean and coastal resources" (33 U.S.C. 1121(b)). A sea grant college is one that maintains "a balanced program of research, education, training, and advisory services in fields related to ocean and coastal resources," and which has been designated as such by the Secretary of Commerce (33

U.S.C. 1126(a)(1) and (2)). There is no statutory requirement that the institution be accredited. All of the territories are included by express reference to them, i.e., "the Virgin Islands, Guam, American Samoa, the Commonwealth of the Mariana Islands" (33 U.S.C. 1122(14)). The last reference, although imperfect, unmistakably refers to the Northern Marianas, so no modification of this law is needed.

(c) Vessel Bridge-to-Bridge Communications (33 U.S.C. 1201-1208) contains the Vessel Bridge-to-Bridge Radiotelephone Act of 1971, by which certain vessels "on navigable waters of the United States" (33 U.S.C. 1201, 1203(b)) are required to have radiotelephone equipment operating on a particular frequency so that "operators of approaching vessels can communicate their intentions to one another" (33 U.S.C. 1201). Vessels required to comply include power-driven vessels of three hundred tons or more, and passenger carrying vessels of one hundred tons or more (33 U.S.C. 1203). Because the requirement applies to such vessels on "navigable waters of the United States", it applies to covered vessels on the navigable waters of the territories (see Memorandum No. 33-1(a))--and it should continue to do so.

(d) Ports and Waterways Safety Program (33 U.S.C. 1221-1236) contains the Ports and Waterways Safety Act, enacted in 1972, and its amendment, the Port and Tanker Safety Act of 1978. The territories are fully covered, each by name (33 U.S.C. 1222(3)). The Secretary of Transportation is given authority to impose vessel operating requirements "in any port or place under the jurisdiction of the United States, in the navigable waters of the United States", and he may do so by establishing "vessel traffic services, consisting of measures for controlling or supervising vessel traffic or for protecting navigation and the marine environment" (33 U.S.C. 1223(a)(1)). A vessel that discharges oil or hazardous material in violation of any Federal law cannot operate in the navigable waters of the United States or transfer cargo "in any port or place under the jurisdiction of the United States" (33 U.S.C. 1228(a)). The language of the provisions of this chapter is consistently sufficient to include the territories --except that injunctive relief may be obtained only in a Federal District Court (33 U.S.C. 1232(d)), so that remedy is not available in Samoa. Because harbor traffic in Pago Pago

Bay can be busy, it would be well if this provision were expanded--perhaps to vest jurisdiction in the High Court of American Samoa. Inasmuch as other penalties are now available in Samoa (33 U.S.C. 1232(a)(1), 1236), the need for the modification is not urgent.

(e) Chapter 26, entitled Water Pollution Prevention and Control (33 U.S.C. 1251-1376), contains the Federal Water Pollution Control Act as often amended, most recently by Public Law 100-4 of February 1987, and it is now usually referred to as the Clean Water Act. The Clean Water Act is an extensive one, and important to the territories, but (1) because it applies quite fully to the territories and (2) because its continued application to them is apparently free of controversy, the Act can be given summary treatment here. Some relatively minor changes, however, would be desirable, and they are discussed below.

The Clean Water Act contains both a number of Federal grant programs as well as substantial regulatory powers, largely vested in the Environmental Protection Agency but with some powers in the Corps of Engineers. It defines the term "State" to include expressly the Virgin Islands, Guam, and Samoa (33 U.S.C. 1362(3)), and by the 1987 amendment, the Northern Marianas as well. (The Northern Marianas were earlier covered, however, by operation of section 502(a)(2) of the Covenant.) The Act applies generally to the U.S. "navigable waters", defined as "the waters of the United States and the territorial seas" (33 U.S.C. 1362(7)), with "territorial seas" defined to mean the seas lying between the low water mark and three miles distant (33 U.S.C. 1362(8)). In addition, as the Environmental Protection Agency has pointed out informally in its comments on this memorandum, the Act also applies in certain respects to particular discharges in the waters of the contiguous zone and the oceans (33 U.S.C. 1321, 1343).

The grant programs provided for--all of which are available to all four territories--include (but are not limited to) grants for planning (33 U.S.C. 1252(c)); for research and development (33 U.S.C. 1255); for pollution control (33 U.S.C. 1256); for training (33 U.S.C. 1259); for water quality management planning (33 U.S.C. 1285(j)); for water pollution control

revolving funds (Title VI, added by sec. 212 of Pub. L. 100-4, 101 Stat. 22); and most important, for sewage treatment works (33 U.S.C. 1281). With respect to all of these except for the last, the territories receive the same treatment, and are eligible for the same grants, as the States. As to grants for sewage treatment works, however, two ceilings are imposed. First, like the States, the percentage of appropriations that may be allotted to each territory is stipulated by law (33 U.S.C. 1285(c)).^{1/} Second, while "no State shall receive less than one-half of one per centum . . . in the case of Guam, Virgin Islands, American Samoa, and the Trust Territories [sic] not more than thirty-three one-hundredths of 1 per centum in the aggregate shall be allotted to all four of these jurisdictions" (33 U.S.C. 1285(e)). Whether the result is equitable for the territories is hard to establish, but it probably is the product of considerations in addition to populations and need.

As for regulatory provisions, the discharge of pollutants, including dredged or fill material, is made unlawful in the absence of a permit containing limitations on such discharges (33 U.S.C. 1311, 1342, 1344), as is the discharge of oil and other hazardous substances, except in compliance with a permit (33 U.S.C. 1321); and marine sanitation devices are required (33 U.S.C. 1322). All of these provisions extend to the territories, with two containing particular definitions to that effect, for purposes of the two sections that contain them: 33 U.S.C. 1321(a)(5) (for oil and hazardous substances) and 33 U.S.C. 1322(a)(4) (for marine sanitation devices). (These particular definitions are unnecessary, because in their absence the general definition at 33 U.S.C. 1362(3), referred to above, would apply--as it does generally throughout the Act--but the additional definitions appear to

^{1/} A comparison of the percentage allotments for the fiscal years 1983 through 1985 (as shown at 33 U.S.C. 1285c), with those for fiscal years 1987 through 1990 (as shown in section 205(c)(3) of Public Law 100-4) shows that each of the four territories suffered a reduction (as did some of the States, while other states gained and some remained the same): Samoa dropped from .000915 in fiscal years '83-'85 to .000908 for '87-'90; Guam from .000662 to .000657; the Northern Marianas from .000425 to .000422; and the Virgin Islands from .000531 to .000527.

be harmless.) Oddly, the definition at 33 U.S.C. 1321(a)(5) was expanded in 1987 by Public Law 100-4 to include the Northern Marianas expressly, while that at 33 U.S.C. 1322(a)(4) was not. (Such a change would be orderly, but is not necessary as a matter of law because the Northern Marianas is included in any event under section 502(a)(2) of the Covenant.)

The court jurisdiction provisions are also uneven and should be both updated and expanded. Two display a laudable effort to accommodate the Pacific territories: at 33 U.S.C. 1321(n) and 1322(m) (for purposes of provisions pertaining to oil and hazardous substances, and for marine sanitation devices, respectively), current law provides that

In the case of Guam and the Trust Territory of the Pacific Islands, actions arising under this section may be brought in the district court of Guam, and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. (33 U.S.C. 1322(m); 33 U.S.C. 1321(n) is not precisely parallel, but does not differ in substance.)

Since that language was enacted, a District Court for the Northern Marianas has been established, so actions arising in the Northern Marianas should be brought there. (The Northern Marianas Federal Laws Commission so recommended (Report, pp. 157-159).) The provision for Samoa remains appropriate (because Samoa does not yet have a U.S. District Court.) As for the Trust Territory, at this writing the situation is unsettled. Most of the former Trust Territory has a new status (that of Freely Associated States), and the Clean Water Act does not apply to those areas. Palau retains trusteeship status, but that condition may soon change. The language

should, in any event, be modified to reflect conditions at whatever time amendatory language is enacted.

But other provisions pertaining to enforcement and judicial venue do not make provision for Samoa, or other Pacific areas without Federal courts--e.g., 33 U.S.C. 1319(b) (pollution discharges), 33 U.S.C. 1344(s) (dredging discharges), 33 U.S.C. 1369 (administrative procedures). These could profit from the kind of treatment accorded oil and hazardous substances, quoted above. The enforcement provision for pollution discharge permits for publicly-owned treatment works may be adequate, for it does not require a Federal District Court, but refers instead to a "court of competent jurisdiction" (33 U.S.C. 1342(h)). But the EPA has informally expressed doubt on this point.

Finally, "any citizen" may bring a civil action for enforcement in a Federal district court (33 U.S.C. 1365). On its face, that would seem to mean that a noncitizen national in Samoa would not be authorized to do this, nor would a U.S. citizen in Samoa have available a court within the jurisdiction. EPA points out informally, however, that the term "citizen" is defined for purposes of this section as "a person or persons having an interest which is or may be adversely affected" (33 U.S.C. 1365(g)), concluding that this definition would include a noncitizen national if he has "an interest which is or may be adversely affected." That conclusion seems doubtful. It seems more likely that the definition serves to limit the term "citizen" (to a citizen or citizens with an interest adversely affected), rather than to expand it (to any noncitizen with an interest adversely affected). The result, in any event, is at least ambiguous. The matter can be labeled nonurgent, but when a convenient legislative vehicle is at hand, correction of it would be seemly--so that a noncitizen national may bring a citizen's suit, and so that jurisdiction is conferred upon an appropriate court with respect to Samoa.

In sum, the treatment accorded the territories by the Clean Water Act is for most purposes adequate, but perfecting changes should be made to reflect the creation of the U.S. District Court for the Northern Marianas; the absence of a

District Court in Samoa; and the status, for purposes of citizen suits, of most Samoans as noncitizen nationals of the United States.

(f) Ocean Dumping (33 U.S.C. 1401-1445) contains the Marine Protection, Research, and Sanctuaries Act of 1972, by which permits are required from the Environmental Protection Agency or the Corps of Engineers for the dumping (i.e., disposal) of any material in ocean waters (including waters within the three-mile limit). Vessels and aircraft registered in the United States are also covered. Particularly stringent requirements are imposed in connection with the disposal of radioactive material (33 U.S.C. 1414(h) and (i)), for which approval by means of a Congressional joint resolution is required. (Congress has by means of another law imposed particular requirements in connection with the transportation and storage of spent nuclear fuel and radioactive wastes in the territories (48 U.S.C. 1491).)

The Act applies to the "territories and possessions of the United States" (33 U.S.C. 1402(d)), and thus to the four areas that are the subjects of this study. The "district courts of the United States" are given enforcement jurisdiction (33 U.S.C. 1415), and that term

includes the District Court of Guam, the District Court of the Virgin Islands . . . and in the case of American Samoa and the Trust Territory of the Pacific Islands, the District Court of the United States for the District of Hawaii, which court shall have jurisdiction over actions arising therein. (33 U.S. 1402(g))

This language caused the Northern Mariana Federal Laws Commission to conclude that the U.S. District Court in Hawaii would be "the proper forum for lawsuits arising in the Northern Mariana Islands" (Report, p. 502). That might have been so before termination of the trusteeship in November 1986, but it would not now be the case; and because the term is defined to "include" the named courts, but not to be

confined to those listed (given the usual meaning of "include"), it seems proper to conclude that the District Court of the Northern Marianas would now have jurisdiction. Accordingly, the recommendation for modification made by the Northern Marianas Commission is now less well taken (Report, pp. 157-160), but the modification remains desirable in order to avoid argument.

(g) Pollution Casualties on High Seas: United States Intervention (33 U.S.C. 1471-1487) refers to the Intervention on the High Seas Act, by which the Coast Guard and the Secretary of Transportation are empowered to "prevent, mitigate, or eliminate . . . a grave and imminent danger to the coastline or related interests of the United States from pollution or threat of pollution of the sea" by an oil or other harmful spillage, caused by "a ship collision, stranding, or other incident of navigation" (33 U.S.C. 1472). The Act comprehends all of the territories by name, including the Northern Marianas (33 U.S.C. 1471(7)). Compensation must be paid by the United States if damage arises because of mitigation measures that exceed those "reasonably necessary" to achieve the Act's purpose, and actions for compensation may be brought in United States district courts. For that purpose, Samoa is included within the jurisdiction of the U.S. District Court in Hawaii,

and the Trust Territory of the Pacific Islands shall be included within the judicial districts of both the District Court of the United States for the District of Hawaii and the District Court of Guam. (33 U.S.C. 1479)

As in the case of the ocean dumping law considered in (f) above, it seems probable that the District Court of the Northern Marianas would have jurisdiction now, in light of trusteeship termination. (The Northern Marianas Commission did not give consideration to the Intervention on the High Seas Act, so there is no advice from that source.) At such time in the future as the trusteeship is terminated with respect to Palau, the reference at 33 U.S.C. 1479 to the Trust Territory should be eliminated, but there should be no question in the

absence of such action as to the jurisdiction of the Northern Marianas court.

(h) Deepwater Ports (33 U.S.C. 1501-1524) contains the Deepwater Port Act, enacted in 1975, which imposes a licensing requirement for the ownership, construction, or operation of a "deepwater port"--i.e., "any fixed or floating manmade structures other than a vessel . . . located beyond the territorial sea and off the coast of the United States" which is used for the loading or unloading of oil (33 U.S.C. 1502(10)). Commonly a deepwater port is one located offshore where oil is transferred from large to smaller tankers or to pipelines. A license may be issued by the Secretary of Transportation only after extensive statutory requirements are met.

There are no deepwater ports adjacent to the territories now, but the possibilities for them have been discussed, particularly off the shores of the Northern Marianas. It is therefore appropriate that the territories, including the Northern Marianas, are all protected by this law, which defines all "territories and possessions" as "States" (33 U.S.C. 1502(18)). Samoa is disadvantaged under the Act, because only citizens may receive licenses (33 U.S.C. 1503(g)), and only Federal district courts have enforcement jurisdiction (33 U.S.C. 1514-1517). But because the waters surrounding Samoa seem an unlikely site for a deepwater port for oil transfers, these deficiencies do not require legislative attention--at least not until circumstances change and such a facility becomes a realistic possibility there.

(i) International Regulations for Preventing Collisions at Sea (33 U.S.C. 1601-1608) are the product of an international convention to which the United States is a party, signed in 1972. Implementing rules that provide safety standards to prevent collisions (set forth following 33 U.S.C. 1602) apply as a result of Presidential action. Vessels subject to these standards include all "vessels, public and private, subject to the jurisdiction of the United States, while upon the high seas" and "all other vessels when on waters subject to the jurisdiction of the United States" (33 U.S.C. 1603). Enforcement is vested in U.S. district courts

(33 U.S.C. 1608), so there is no forum in Samoa. This is a deficiency that ought to be corrected, in the interest of safe navigation and ease of administration in the high seas surrounding Samoa.

(j) The chapter entitled Ocean Pollution Research and Development and Monitoring Planning (33 U.S.C. 1701-1709) contains the National Ocean Pollution Planning Act of 1978. Under the act the National Oceanic and Atmospheric Administration is made the lead Federal agency on this subject and is required to prepare a plan "for the overall Federal effort in ocean pollution research and development and monitoring" (33 U.S.C. 1703(a)). No geographic limitations appear that would exclude waters surrounding the territories. "Ocean pollution" means a change in the marine environment (33 U.S.C. 1702(6)), and "marine environment" means

the coastal zone . . .; the seabed, subsoil, and waters of the territorial sea of the United States; the waters of any zone over which the United States asserts exclusive fishery management authority; the waters of the high seas . . . (33 U.S.C. 1702(4)).

The Act was enacted after the effective date of section 502(a)(2) of the Northern Marianas Covenant, but the Northern Marianas are comprehended by the foregoing language through section 105 of the Covenant, inasmuch as the law is applicable to the States. (In unpublished research, the Staff of the Northern Marianas Federal Laws Commission reached the same conclusion.)

Grants may be made for research, development, and monitoring related to the plan, and such grants are authorized for

Any person, including institutions of higher education and departments, agencies, and instrumentalities of the Federal Government or of any State or political subdivision thereof. . . (33 U.S.C. 1705(b)).

Because a grant may be made to "any person", and because the elaboration that follows in the quoted section is illustrative and not restrictive, a grant could be made to a qualified individual or institution in one of the territories.

(k) The Inland Waterways Trust Fund (33 U.S.C. 1803-1804) pertains only to particular rivers in the continental United States and is irrelevant for purposes of this study.

(l) The Prevention of Pollution from Ships (33 U.S.C. 1901-1911) implements a 1973 international convention on that subject, plus its Protocols and Annexes, and gives to the Coast Guard the duty of administration and enforcement. The territories are not excluded. The ships covered, which are thereby required to have facilities that meet pollution standards, include any "ship of United States registry or nationality, or one operated under the authority of the United States, wherever located" (33 U.S.C. 1902); and the ports and terminals covered, which must have "reception facilities" that meet established standards (33 U.S.C. 1905), include those "located in the navigable waters of the United States or subject to the jurisdiction of the United States" (33 U.S.C. 1901(9))--language that comprehends all of the offshore areas. Although some of the enforcement provisions require the presence of a Federal District Court (33 U.S.C. 1908), thereby creating a potential problem for Samoa, a further provision permits "any case" of alleged violation to be brought in the District Court for the District of Columbia (33 U.S.C. 1910(c)(4)). That should prove sufficient to meet any need arising in Samoa.

(m) Inland Navigational Rules (33 U.S.C. 2001-2073) contain extensive rules for the navigation of vessels in the interest of safety, and apply to "all vessels upon the inland waters of the United States" (33 U.S.C. 2001(a)). "Inland waters" means

the navigable waters of the United States shoreward of the navigational demarcation lines dividing the high seas from harbors,

rivers, and other inland waters of the United States . . . (33 U.S.C. 2003(o)).

That language would comprehend the inland waters of the territories (see the discussion at Memorandum No. 33-1(a)), including the Northern Marianas. (The Inland Navigational Rules Act, which is the basis for this chapter, was enacted in 1980, and therefore does not apply to the Northern Marianas under section 502(a)(2) of the Covenant. But that Act would apply under section 105, being applicable to the States, and unpublished research of the Northern Marianas Federal Laws Commission so concludes.)

None of the territories, however, in fact has inland waters of sufficient dimensions to support significant vessel traffic. The inland navigational rules are, therefore, academic for immediate purposes.

(n) The chapter entitled Artificial Reefs (33 U.S.C. 2101-2106) is derived from the National Fishing Enhancement Act of 1984. Its purpose is to permit the construction of artificial reefs in navigable waters of the United States (33 U.S.C. 2105(3)) when they will, among other things, "enhance fishery resources to the maximum extent practicable" and "facilitate access and utilization by United States recreational and commercial fishermen" (33 U.S.C. 2102). The terms upon which the Secretary of the Army may issue a permit for the construction of an artificial reef are specified, and they include consultation with the appropriate "State" (33 U.S.C. 2104(a)(1)). Somewhat surprisingly, given its recent enactment, the term "State" is not defined to include the Northern Marianas (and the 1984 enactment date means that section 502(a)(2) of the Covenant does not operate to extend the law there). But because the law does apply to the "States", it applies to the Northern Marianas under section 105 of the Covenant--as well as to the Virgin Islands, Guam, and Samoa, each of which is named in the law (33 U.S.C. 2105(2)).

(o) The chapter entitled Water Resources Development (33 U.S.C. 2201-2311) contains the Water Resources Development

Act approved November 17, 1986. It deals with two subjects of interest to the territories: harbor improvements and water resources studies.

With respect to harbor development, in connection with which all of the territories are covered by name (33 U.S.C. 2241(8)), the Act specifies the authority vested in "non-Federal interests", a term that means public bodies below the Federal level, and details the manner in which harbor improvement costs are shared between Federal and non-Federal interests. The territories are accorded the same treatment as the States, except that in the case of studies and projects in Samoa, Guam, the Northern Marianas, and the Virgin Islands, the Secretary of the Army "shall waive local cost-sharing requirements up to \$200,000" (33 U.S.C. 2310)--language that is doubtless a reflection of the territories' general difficulty in producing local matching, and of the waiver of local matching funds provided at 48 U.S.C. 1469a(d).

(The usual problem of court jurisdiction in Samoa arises, e.g. at 33 U.S.C. 2236(c)(1), but because Samoa is an unlikely site of a participating "non-Federal interest", the problem may here be overlooked with impunity.)

With respect to water resource studies, the needs of the territories are directly met. The Secretary of the Army is required to make a study in each of the territories--the Virgin Islands, Guam, American Samoa, and the Northern Marianas--to provide plans for the development, utilization, and conservation of water and related land resources, at a total cost of \$2 million for each study.^{2/} Each territorial study is to consider

^{2/} This section authorizing water resource studies (33 U.S.C. 2261), as well as sections pertaining to harbor improvements by non-Federal interests (33 U.S.C. 2241(8) and 2310), and to certain flood control projects (33 U.S.C. 2290) all make express reference to the Trust Territory and purport to make their provisions applicable there. The status of most of the former Trust Territory was terminated as such by Presidential Proclamation on November 3, 1986--just two weeks before the President approved the Water (continued...)

needs for flood protection, wise use of flood plain lands, navigation facilities, hydroelectric power generation, regional water supply and waste water management facilities systems, general recreation facilities, enhancement and control of water quality, enhancement and conservation of fish and wildlife, and other measures for environmental enhancement, economic, and human resources development. (33 U.S.C. 2261)

Any study funds made available and not needed for the study are available for the construction of authorized water resources projects. In sum, territorial needs on this subject are dealt with both clearly and appropriately.

Conclusion: With few exceptions, the laws discussed above meet territorial needs. The exceptions concern court jurisdiction in Samoa (under the Ports and Waterways Safety Act, (d) above, under the Clean Water Act, (e) above, and under the International Regulations for Preventing Collisions at Sea, (i) above); the need for references to the District Court for the Northern Marianas (in the Clean Water Act, (e) above, and in connection with Ocean Dumping (f) above); and citizen suits in Samoa (under the Clean Water Act, (e) above).

Federal agency comments: Comments were requested from the Coast Guard, the Corps of Engineers and the Department of Defense, the Environmental Protection Agency, and the Department of Justice. All comments received are reflected above, except

^{2/}(...continued)

Resources Development Act of 1986. It is beyond the scope, now, of this study to assess the application of the Act to those parts of the former Trust Territory that have lately become freely associated states, i.e., the Federal States of Micronesia and the Republic of the Marshall Islands. The language of the Water Resources Development Act of 1986 pertaining to the Trust Territory was obviously drafted well before the status of these two governments changed.

that some comments from the EPA were directed toward 1987 amendments to the Clean water Act. Those amendments are for the most part not discussed above, but they appear not to be of direct concern to the territories, nor do they appear to present any problem to them. Additionally, the Coast Guard did not respond to a request for comments. Although the Coast Guard, with whom many of these subject have been discussed from time to time, is not known to differ with the statements and conclusions expressed above, it should not be inferred that the Coast Guard by its silence concurs.

Title 35 - PATENTS

- Contains nothing of substantial interest to the territories.

Memorandum
Number

Subject

35 U.S.C.
sections

35-1

- Patents

1-376

Subject: Title 35 of the United States Code
Patents^{1/}
(35 U.S.C. 1-376)

Purpose: To provide protection for a term of years to an inventor, so as to grant to that inventor the right to exclude others from making, using, or selling the claimed invention.

Territorial application: The United States patent laws apply fully to the people of the Virgin Islands, Guam, Samoa, and the Northern Marianas. The absence of a Federal court in American Samoa could be a handicap to enforcement by a Samoan of a patent right, but other remedies would be available to such a Samoan.

Recommendation: The patent laws require no modification to meet the needs of the territories and their people.

Discussion: The patent laws, which were enacted into positive law in 1952, constitute a portion of what are sometimes referred to as the intellectual property laws (see Memorandum 15-5(j) on Trademarks and Memorandum 17-1 on Copyrights), and they derive from Article I, Section 8, Clause 8 of the United States Constitution. That provision empowers the Congress

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

^{1/} Given the content of Title 35, and the summary treatment that its subject matter permits for purposes of this study, it does not seem necessary to analyze it by either chapter or other subdivision. The title contains 37 chapters that are divided into four parts: Part I, Patent and Trademark Office (35 U.S.C. 1-42); Part II, Patentability of Inventions and Grant of Patents (35 U.S.C. 100-211); Part III, Patents and Protection of Patent Rights (35 U.S.C. 251-307); and Part IV, Patent Cooperation Treaty (35 U.S.C. 351-376).

The proper subject for an invention that could be patentable encompasses

any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof (35 U.S.C. 101).

In general, the term of the grant is 17 years (35 U.S.C. 154), but extensions are available in particular circumstances. Separate provisions apply to patents for plants (35 U.S.C. 161), and designs (35 U.S.C. 171).

The terms "United States" and "this country", as they appear in the patent laws, are defined to mean "the United States of America, its territories and possessions" (35 U.S.C. 100(c))--a definition that comprehends the Virgin Islands, Guam, and Samoa, and almost certainly the Northern Marianas as well. If a question were to exist as to the Northern Marianas, it would be clear that they are within the United States for purposes of the patent laws by operation of law under section 502(a)(2) of the Northern Marianas Covenant, for these laws are applicable both to the States and to Guam.

The patent laws contain no citizenship requirements, so a problem often posed for the Northern Marianas and Samoa does not exist here. (A reference to "citizens" of the United States at 35 U.S.C. 119, perhaps the only such reference in the Title, is not a restrictive one, being instead descriptive of treaty or other international agreements. Similarly, a reference to "nationals" of the United States at 35 U.S.C. 361 creates no difficulty, because the provision in question applies also to all "residents of the United States".)

The people of the territories, thus, are treated precisely the same as people of the States under the patent laws--and this is as it should be.

The only matter of possible concern relates to the enforcement in Samoa of patent rights by the patent holder. In general, only the Federal courts have jurisdiction in patent cases, and Samoa, alone among the territories, is outside the Federal judicial system. But a Samoan who believes his patent has been infringed would probably not be without a remedy, for he might either follow the infringer to another U.S. jurisdiction, or enforce his right through a non-Federal action, using such a ground as unfair competition. Because there is no known instance of a Samoan in fact suffering from the lack of an available forum, this problem need not be further pursued in this study. In any event, if it be a problem, it is of insufficient magnitude to warrant legislative redress at this time.

Conclusion: The patent laws require no modification to meet the needs of the territories or territorial residents.

Federal agency comments: This memorandum has been reviewed by an expert in patent law in the Solicitor's Office of the Interior Department, and all comments received have been reflected above.

Title 36 - PATRIOTIC SOCIETIES AND OBSERVANCES

- Contains nothing of substantial interest to the territories.

<u>Memorandum Number</u>	<u>Subject</u>	<u>36 U.S.C. sections</u>
36-1	- Federally-Chartered Patriotic Societies and Other Private Corporations	Passim
36-2	- (a) American Battle Monuments Commission	121-138b
	- (b) National Observances	141-169h
	- (c) Patriotic Customs	170-186
	- (d) Presidential Inaugural Ceremonies	721-730
	- (e) Audits of Federally Chartered Corporations	1101-1103

Subject: Federally-Chartered Patriotic Societies and Other Private Corporations
Title 36 generally

Comment: The bulk of Title 36, which is entitled "Patriotic Societies and Observances", is devoted to the individual charters of 71 private organizations that have been incorporated by Act of Congress (as of the end of 1984). Many can be described as "patriotic societies", while others are directed toward different objectives--but by definition, worthy ones.

A review of the charters shows, as illustrated below, that no society or organization of likely relevance to the territories is by law precluded from carrying on its activities in the territories. A handful may not have clear authority to function in the territories, but they are largely ones that are not very lively today: e.g., the Sons of the American Revolution (4), the United Spanish War Veterans (8), the GAR Auxiliary (48).

The most relevant point that emerges from a review of these charters is the manner in which fashions have changed in referring to the areas of the United States that are not States. Not surprisingly, early charters speak of the "States and Territories" (see the Red Cross (1), and the Boy Scouts (5)); after World War II, the term "possessions" begins to appear (e.g., see the Amvets (11), the Ladies of the GAR (13), and the Future Farmers of America (23)); commencing in the 1960's after the last incorporated "Territories" became States, the terminology shifted to "territories and possessions" (e.g., see the Naval Sea Cadet Corps (49) and the USO (53)), with Puerto Rico occasionally receiving specific mention (e.g., see the Little League (50)); and finally, obviously as a result of model charter language, recently chartered corporations may carry on activities in the Commonwealth of Puerto Rico "and the territories and possessions of the United States" (see nos. (55) through (71)). Earlier charters appear sometimes to be the product of a model form, but it was often modified, particularly in relation to the geographic scope of the organization's activities. Those of the 1980's have, commencing with the Ski

Patrol (55) in December 1980, rigidly embraced the "territories and possessions" usage.

That phrase comprehends American Samoa, Guam, and the Virgin Islands, and it will comprehend the Northern Marianas upon trusteeship termination. The effect of the language, however, is even now in the case of pre-1978 statutes to include the Northern Marianas by operation of law under section 502(a)(2) of the Covenant.

In connection with the discussion that follows as to each individually-chartered corporation, there appear in parentheses (following the name) the Chapter number within Title 36; the section of Title 36 at which the charter commences; and the year the charter was originally granted.

Discussion: (1) The American National Red Cross (Chapter 1, 36 U.S.C. 1, 1905): "Membership" in the Red Cross is open to "all the people of the United States, its Territories, and dependencies", and "chapters" may be located "within the States and Territories" (36 U.S.C. 4a). The Red Cross reports informally that there are currently active chapters in the territories, and Puerto Rico.

(2) The Daughters of the American Revolution (Chapter 1A, 36 U.S.C. 18, 1896): No geographical provision appears.

(3) The American Historical Association (Chapter 1B, 36 U.S.C. 20, 1889): No geographical provision appears.

(4) The Sons of the American Revolution (Chapter 1C, 36 U.S.C. 20a, 1906): References to the "States" suggest that the organization is confined to them (36 U.S.C. 20c).

(5) The Boy Scouts of America (Chapter 2, 36 U.S.C. 21, 1916): The organization may conduct its affairs "in the several States and Territories of the United States" (36 U.S.C. 22). In fact there are Boy Scout troops in Puerto Rico

and the Virgin Islands. The Boy Scouts organization advises informally that it regards itself as authorized to conduct its activities and to sponsor troops in the Pacific territories.

(6) The Girl Scouts of America (Chapter 2A, 36 U.S.C. 31, 1950): The Girl Scouts may function in the "States, Territories, and possessions" (36 U.S.C. 32).

(7) The American Legion (Chapter 3, 36 U.S.C. 41, 1919): The Legion may establish "State and Territorial organizations" (36 U.S.C. 44). The American Legion reports informally that there are no posts in the Virgin Islands, Guam, Samoa, or the Northern Marianas; but because there are posts in, among other places, Puerto Rico and the Panama Canal area, there would be authority for them in the current territories, were citizen-veterans minded to establish a post or posts there.

(8) The United Spanish War Veterans (Chapter 3A, 36 U.S.C. 56, 1940): Although some provisions of the charter suggest that the organization is confined to the States (e.g., 36 U.S.C. 56f), another refers to the "Territories and dependencies" (36 U.S.C. 56b), but given the military service required for membership (i.e., prior to July 4, 1902), there are no known recruits anywhere.

(9) The Marine Corps League (Chapter 3B, 36 U.S.C. 57, 1937): No geographical provision appears.

(10) The Belleau Wood Memorial Association (Chapter 4, 36 U.S.C. 61, 1923): Its activities are probably confined to the States (36 U.S.C. 63), and France. But since Belleau Wood is significant as the site of an important battle in World War I, it is probably of no interest in the current territories.

(11) Amvets (Chapter 4A, 36 U.S.C. 67, 1947): The organization's activities "shall be conducted throughout the various States, Territories, and possessions of the United States" (36 U.S.C. 67d(4)).

(12) The Grand Army of the Republic (Chapter 5, 36 U.S.C. 71 (1924): The GAR charter authorizes activities throughout the "Territories and dependencies" (36 U.S.C. 72), but since the cut-off date for eligibility is military service no later than April 9, 1865, it probably doesn't matter.

(13) The Ladies of the Grand Army of the Republic (Chapter 5A, 36 U.S.C. 78, 1959): The organization, which perpetuates the memory "of the men who saved the Union in 1861 to 1865" (36 U.S.C. 78b), and which is open to "female blood relatives" of those who did so (36 U.S.C. 78d), is authorized to carry on its activities throughout the "States, Territories, and possessions" (36 U.S.C. 78g).

(14) The United States Blind Veterans of World War I Chapter 6, 36 U.S.C. 81, 1924): There may be "State and Territorial" chapters (36 U.S.C. 84).

(15) The Disabled American Veterans (Chapter 6A, 36 U.S.C. 90a, 1932): They may establish posts in the States and Territories (36 U.S.C. 90d).

(16) The American War Mothers (Chapter 7, 36 U.S.C. 91, 1925): It may establish "State, Territorial, and local subdivisions" (36 U.S.C. 95).

(17) The Veterans of Foreign Wars of the United States (Chapter 7A, 36 U.S.C. 111, 1936): The organization may establish "subordinate State and Territorial subdivisions and local chapters" (36 U.S.C. 114).

(18) The National Yeomen F (Chapter 8A, 36 U.S.C. 139, 1936): The organization, which has three full pages in the U.S. Code of named incorporators (a record for Title 36), all female, and which is designed to perpetuate the memory of

Yeoman F who served in the Navy in World War I, appears to have no geographical constraints.^{1/}

(19) The Navy Club of the United States of America (Chapter 8B, 36 U.S.C. 140, 1940): No geographical provision appears.

(20) The Civil Air Patrol (Chapter 11, 36 U.S.C. 201, 1946): It may function in the "States and Territories" (36 U.S.C. 205).

(21) The Reserve Officers Association (Chapter 12, 36 U.S.C. 221, 1950): It may function in the Territories and possessions (36 U.S.C. 237).

(22) The National Academy of Sciences, whose incorporators begin with Louis Agassiz (Chapter 13, 36 U.S.C. 251, 1863): No geographical provision appears, but it is open to "foreign and domestic members", by election (36 U.S.C. 252).

(23) The Future Farmers of America (Chapter 14, U.S.C. 271, 1950): Its activities may be conducted "throughout the various States, Territories, and possessions" (36 U.S.C. 275).

(24) The Military Chaplains Association of the United States of America (Chapter 15, 36 U.S.C. 311, 1950): No geographical provision appears.

(25) The American Society of International Law (Chapter 16, 36 U.S.C. 341, 1950): The Society may conduct

^{1/} While the statute provides that the organization is "The National Yeoman F", it further provides that it fosters the memory of the service of "Yeoman (f)", as well as "Yeomen (f)". The organization is, or was, apparently quite flexible.

its activities at "any place or places in the United States" (36 U.S.C. 344).

(26) The United States Olympic Committee, whose incorporators begin with Avery Brundage (Chapter 17, 36 U.S.C. 371, 1950): Notwithstanding a uniquely long charter, this Committee has no provision concerning the boundaries of its activities. But various references to the "States" alone do not appear to be confining (e.g., 36 U.S.C. 375(b), 381), and it is charged with recognizing the national governing bodies of particular sports, each of which is exhorted to develop interest in that sport "throughout the United States" (36 U.S.C. 392(a)(1)).

(27) The National Conference of State Societies (Chapter 18, 36 U.S.C. 401, 1952): Its activities may be conducted "throughout the various States and Territories" (36 U.S.C. 404(a)), and it is authorized to promote friendly relations among "the various State and Territorial societies in the District of Columbia" (36 U.S.C. 402). Given the 1952 enactment date, that language might be read to exclude the current unincorporated territories, but it is in fact not so read. There are "State" societies for the Virgin Islands, Guam, and American Samoa (but not yet for the Northern Marianas), and all are in fact members of the National Conference of State Societies.

(28) The Corregidor Bataan Memorial Commission (Chapter 19, 36 U.S.C. 426, 1953): The Commission has ceased to exist (see note following section cited.)

(29) The National Conference on Citizenship (Chapter 20, 36 U.S.C. 431, 1953): It may conduct its activities throughout the States, Territories, and possessions (36 U.S.C. 435(a)).

(30) The National Safety Council (Chapter 21, 36 U.S.C. 461, 1953): It may establish chapters "in appropriate places throughout the United States, its Territories and possessions" (36 U.S.C. 464(14)).

(31) The Pershing Hall Memorial Fund (Chapter 22, 36 U.S.C. 491, 1935): This Fund is irrelevant for current purposes, pertaining solely to a memorial long since erected in Paris, under the auspices of the American Legion.

(32) The Board for Fundamental Education (Chapter 23, 36 U.S.C. 501, 1954): It may conduct its activities in the Territories and possessions (36 U.S.C. 505).

(33) The Sons of Union Veterans of the Civil War (Chapter 24, 36 U.S.C. 531, 1954): Its activities may be conducted in the Territories and possessions (36 U.S.C. 539(a)).

(34) The Foundation of the Federal Bar Association (Chapter 25, 36 U.S.C. 571, 1954): It "may conduct its activities at any place or places in the United States, or elsewhere" (36 U.S.C. 575(a)), so the whole world is its oyster.

(35) The National Fund for Medical Education (Chapter 26, 36 U.S.C. 601, 1954): Its activities may be conducted in the Territories and possessions (36 U.S.C. 605(a)).

(36) The Legion of Valor of the United States of America (Chapter 27, 36 U.S.C. 631, 1955): The organization, whose membership is composed of those who have received the Congressional Medal of Honor, the Distinguished Service Cross, the Air Force Cross, or the Navy Cross, may conduct its activities in the Territories and possessions (36 U.S.C. 635(a)).

(37) The National Music Council (Chapter 28, 36 U.S.C. 661, 1956): Its activities may be conducted in the Territories and possessions (36 U.S.C. 665).

(38) The Boys' Club of America (Chapter 29, 36 U.S.C. 691, 1956): Its activities may be conducted in the Territories and possessions (36 U.S.C. 695(a)).

(39) The Civil War Centennial Commission (Chapter 31, 36 U.S.C. 741, 1957): This Commission has terminated (36 U.S.C. 746(c)).

(40) The Veterans of World War I (Chapter 32, 36 U.S.C. 761, 1958): The organization may conduct its activities in the Territories and possessions (36 U.S.C. 769(a)).

(41) The Congressional Medal of Honor Society (Chapter 33, 36 U.S.C. 791, 1958): It may conduct its activities in the Territories and possessions (36 U.S.C. 795(a)).

(42) The Military Order of the Purple Heart (Chapter 34, 36 U.S.C. 821, 1958): It may conduct its activities in the Territories and possessions (36 U.S.C. 825(a)).

(43) The Blinded Veterans Association (Chapter 35, 36 U.S.C. 851, 1958): It may conduct its activities in the Territories and possessions (36 U.S.C. 855(a)).

(44) Big Brothers-Big Sisters of America (Chapter 36, 36 U.S.C. 881, 1958): Its activities may be conducted in the Territories and possessions (36 U.S.C. 885(a)).

(45) The Jewish War Veterans, U.S.A., National Memorial Inc. (Chapter 37, 36 U.S.C. 911, 1958): It may conduct its activities in the Territories and possessions (36 U.S.C. 915(a)).

(46) The Blue Star Mothers of America (Chapter 38, 36 U.S.C. 941, 1960): Its charter contains no provision concerning the geographical scope of its activities. Meetings

may be held in any "State or Territory" (36 U.S.C. 946), however, and since on the date of its charter there was, strictly speaking, no longer any "Territory" remaining, the term could reasonably be construed to include a "territory". The point may be academic, however, for the organization appears to be passing from the scene. The charter, not amended since 1960, permits membership only to mothers of those who served in World War II and Korea (36 U.S.C. 945).

(47) The Agricultural Hall of Fame (Chapter 39, 36 U.S.C. 971, 1960): Its activities may be conducted throughout the Territories and possessions (36 U.S.C. 975(a)).

(48) The National Woman's Relief Corps, Auxiliary to the Grand Army of the Republic (Chapter 40, 36 U.S.C. 1001, 1962): Its activities are confined to the States and the District of Columbia (36 U.S.C. 1009(a)), but that is untroublesome at this late stage, inasmuch as its members are confined to the "wives, mothers, daughters, and sisters" of the "men who save the Union in 1861 to 1865" (36 U.S.C. 1005, 1003).

(49) The Naval Sea Cadet Corps (Chapter 41, 36 U.S.C. 1041, 1962): Its activities may be conducted "throughout the various States, territories, and possessions of the United States" (36 U.S.C. 1045(a)).

(50) Little League Baseball, Inc. (Chapter 41A, 36 U.S.C. 1071, 1964): Its activities may be conducted "throughout the various States, the Commonwealth of Puerto Rico, and the possessions of the United States, and in other areas throughout the world" (36 U.S.C. 1075(a)).

(51) The Paralyzed Veterans of America (Chapter 43, 36 U.S.C. 1151, 1971): Its activities may be conducted in "any territory or possession of the United States" (36 U.S.C. 1158).

(52) The United States Capitol Historical Society (Chapter 44, 36 U.S.C. 1201, 1978): Its activities may be conducted "throughout the various possessions of the United States" (36 U.S.C. 1205(a)).

(53) The United Service Organizations (USO) (Chapter 45, 36 U.S.C. 1301, 1979): Activities may be conducted "throughout the various States, territories, and possessions of the United States, and in foreign countries" (36 U.S.C. 1309(a)).

(54) The United States Holocaust Memorial Council (Chapter 46, 36 U.S.C. 1401, 1980): It is to encourage observances "throughout the United States" (36 U.S.C. 1401(1)).

(55) The National Ski Patrol System (Chapter 47, 36 U.S.C. 1501, 1980): Unlikely as it may be to do so, the Ski Patrol may in fact function in "the territories and possessions of the United States" (36 U.S.C. 1513).

(56) The Gold Star Wives of America (Chapter 48, 36 U.S.C. 1601, 1980): The organization may function in the "territories and possessions" (36 U.S.C. 1613).

(57) The Italian American War Veterans of the United States (Chapter 49, 36 U.S.C. 1701, 1981): It may conduct activities in the "territories and possessions" (36 U.S.C. 1713).

(58) The United States Submarine Veterans of World War II (Chapter 50, 36 U.S.C. 1801, 1981): It may function in the "territories and possessions" (36 U.S.C. 1813).

(59) The American Council of Learned Societies (Chapter 51, 36 U.S.C. 1901, 1982): It may function in the "territories and possessions" (36 U.S.C. 1913).

(60) The National Federation of Music Clubs (Chapter 52, 36 U.S.C. 2001, 1982): It may function in the "territories and possessions" (36 U.S.C. 2013).

(61) American Ex-Prisoners of War (Chapter 53, 36 U.S.C. 2101, 1982): It may function in the "territories and possessions" (36 U.S.C. 2113).

(62) Former Members of Congress (Chapter 54, 36 U.S.C. 2201, 1983): It may function in the "territories and possessions" (36 U.S.C. 2213).

(63) The National Academy of Public Administration (Chapter 55, 36 U.S.C. 2301, 1984): It may function in the "territories and possessions" (36 U.S.C. 2313).

(64) The American Gold Star Mothers (Chapter 56, 36 U.S.C. 2401, 1984): It may function in the "territories and possessions" (36 U.S.C. 2413).

(65) The Polish Legion of American Veterans, U.S.A. (Chapter 57, 36 U.S.C. 2501, 1984): It may function in the "territories and possessions" (36 U.S.C. 2513).

(66) The Catholic War Veterans of the United States of America (Chapter 58, 36 U.S.C. 2601, 1984): It may function in the "territories and possessions" (36 U.S.C. 2613).

(67) The Jewish War Veterans of the United States of America (Chapter 59, 36 U.S.C. 2701, 1984): It may function in the "territories and possessions" (36 U.S.C. 2713).

(68) The Navy Wives Clubs of America (Chapter 60, 36 U.S.C. 2801, 1984): It may function in the "territories and possessions" (36 U.S.C. 2813).

(69) The National Society, Daughters of the American Colonists (Chapter 61, 36 U.S.C. 2901, 1984): It may function in the "territories and possessions" (36 U.S.C. 2914).

(70) The 369th Veterans' Association (Chapter 62, 36 U.S.C. 3001, 1984), pertaining to the 369th antiaircraft artillery group: It may function in the "territories and possessions" (36 U.S.C. 3013).

(71) The Women's Army Corps Veterans' Association (Chapter 63, 36 U.S.C. 3101, 1984); It may function in the "territories and possessions" (36 U.S.C. 3113).

Conclusion: The charters of the private corporations that have been incorporated by Act of Congress and that are contained in Title 36 are adequate to meet territorial needs and interests.

Federal agency comments: None have been sought because none appear necessary.

Subject: Patriotic Observances and Other General Provisions

- (a) American Battle Monuments Commission
Title 36, Chapter 8 (36 U.S.C. 121-138b)
- (b) National Observances
Title 36, Chapter 9 (36 U.S.C. 141-169h)
- (c) Patriotic Customs
Title 36, Chapter 10 (36 U.S.C. 170-186)
- (d) Presidential Inaugural Ceremonies
Title 36, Chapter 30 (36 U.S.C. 721-730)
- (e) Audits of Federally Chartered Corporations
Title 36, Chapter 42 (36 U.S.C. 1101-1103)

Comment: Most of Title 36, which is entitled "Patriotic Societies and Observances", is devoted to the individual charters of a considerable number of disparate, Federally-chartered, private corporations. There are other subjects dealt with from time to time, however, some of which justify the "Patriotic Observances" segment of the title of Title 36, and others of which constitute subjects of general application. The purpose of this memorandum is to discuss all such provisions of Title 36, i.e., all of the provisions of the Title that do not concern individual charters and that are, therefore, not comprehended by Memorandum No. 36-1.

Discussion: (a) The American Battle Monuments Commission (36 U.S.C. 121-138b) is an eleven-person, Presidentially-appointed commission that is charged with the design and maintenance of permanent military cemeteries and memorials on foreign soil. The laws establishing the Commission and authorizing its activities, dating largely from 1923, contain a number of imperfections for purposes of this study, but none appears serious enough to require correction. For example, although the Commission's responsibilities are several times described as relating to areas "outside the United States and its Territories and possessions" (36 U.S.C. 122b, 123, 132), the phrase "outside the United States"--not further adorned--also appears (36 U.S.C. 123). The term "States" often appears (36 U.S.C. 125(a), (b), and (c), 128), as does a reference to "the

continental limits of the United States" (36 U.S.C. 125a)), but in context these do not create a difficulty for the territories. A few citizenship requirements appear (36 U.S.C. 121, 125), but these also do not appear troublesome. In sum, the charter of this commission does no violence to territorial interests.

(b) The chapter entitled National Observances (36 U.S.C. 141-169h) collects a miscellany of officially recognized people, ideas, days, and months beginning with Mother's day (36 U.S.C. 141). These are largely exhortations to the "people of the United States" to take note of, and preferably revere, the honoree. No problems of moment appear in connection with the purpose of this study.

(c) Patriotic Customs (36 U.S.C. 170-186) prescribe the national anthem, the pledge of allegiance, and the conduct that is appropriate when either is performed; the manner in which the national flag should be treated; the creation and use of service flags; and the national motto. These are without geographical limitations, and occasionally the "Territories and possessions" (or "territories and possessions") are expressly included (36 U.S.C. 175(c),(m)).

(d) The Laws Relative to Presidential Inaugural Ceremonies (36 U.S.C. 721-730) concern some of mechanics of organizing the event (e.g., special automobile license plates, overhead electrical lines), and contain nothing of special interest to the territories.

(e) Audits of Federally Chartered Corporations (36 U.S.C. 1101-1103) impose uniform auditing and financial reporting requirements upon most (but not all) of the private corporations that are the subject of charters discussed in Memorandum No. 36-1. The chapter contains nothing of interest for purposes of this study.

Conclusion: The chapters of Title 36 that are discussed above contain no provisions that create problems in the territories.

Memorandum No. 36-2

Federal agency comments: None have been sought because none appear necessary.

Title 37 - PAY AND ALLOWANCES OF THE UNIFORMED SERVICES

(**) Contains a recommendation for a change in the law, but the need for it is not urgent.

<u>Memorandum Number</u>	<u>Subject</u>	<u>37 U.S.C. sections</u>
37-1	(**) Pay and Allowances of the Uniformed Services	101-1012

Subject: Pay and Allowances of the Uniformed Services^{1/}
Title 37 of the United States Code

Comment: The provisions of Title 37 require no modification at this time to meet the needs of the territories. At such time as a National Guard unit is established in the Northern Marianas, however, an amendment will be necessary in Title 37 to accommodate that development.

Discussion: As its title states, Title 37 is concerned with pay and allowances to those in the Uniformed Services--a phrase defined to mean the Army, Navy, Air Force, Marine Corps, Coast Guard, National Oceanic and Atmospheric Administration, and Public Health Service (37 U.S.C. 101(3)). With the two exceptions mentioned below, the provisions of Title 37 are applicable generally to individuals, without differentiation between the States on the one hand and offshore areas on the other (except that, reflecting geographical rather than political realities, sometimes the territories are treated, along with Puerto Rico and the States of Alaska and Hawaii, as outside the United States; e.g., 37 U.S.C. 405(a), which permits the payment of per diem allowances to members of the uniformed services on duty "outside the United States"). The general treatment accorded the territories is thus nondiscriminatory and otherwise appropriate.

^{1/} Given the content of Title 37, it is unnecessary for purposes of this study to analyze it chapter-by-chapter. The Title contains the following subjects, indicated by chapter headings: Chapter 1, Definitions, 37 U.S.C. 101; Chapter 3, Basic Pay, 37 U.S.C. 201-209; Chapter 5, Special and Incentive Pay, 37 U.S.C. 301-315; Chapter 7, Allowances, 37 U.S.C. 401-430; Chapter 9, Leave, 37 U.S.C. 501-504; Chapter 10, Payments to Missing Persons, 551-558; Chapter 11, Payments to Mentally Incompetent Persons, 37 U.S.C. 601-604; Chapter 13, Allotments and Assignments of Pay, 37 U.S.C. 701-707; Chapter 15, Prohibitions and Penalties, 37 U.S.C. 801-805; Chapter 17, Miscellaneous Rights and Benefits, 37 U.S.C. 901-908; and Chapter 19, Administration, 37 U.S.C. 1001-1012.

Of the two exceptions, the first appears at 37 U.S.C. 305(b). Section 305(a) permits special (i.e., additional) pay to enlisted personnel of the uniformed services who are on duty "outside the 48 contiguous States and the District of Columbia". Section 305(b), however, states that such special pay (therein referred to as "foreign pay," even though Alaska and Hawaii, among others, thereby become "foreign") cannot be made to

a member of a uniformed service who is a resident of a State, Puerto Rico, the Virgin Islands, a possession, or a foreign country and who is serving in that State, Puerto Rico, the Virgin Islands, that possession, or that foreign country. . . .

Such provision too, is clearly nondiscriminatory and otherwise appropriate. (The term "possessions", which does not appear to be used elsewhere in Title 37, is defined as a term that "includes . . . Guam, American Samoa, and the guano islands" (37 U.S.C. 101(2)). By operation of section 502(a)(2) of the Covenant, the Northern Marianas is also included.)

The second exception is almost certainly an anachronism, dating from a time that preceded Philippine independence in 1946: 37 U.S.C. 701(b) permits a contract surgeon or a contract dental surgeon to transfer or assign his pay account, if he (the statute, not surprisingly, does not anticipate a "she") is "on duty in Alaska, Hawaii, the Philippine Islands, or Puerto Rico". It seems improbable that any real injury is done by limiting such a privilege to those four areas only, so this section, even though it is marginally discriminatory, may safely be ignored.

A difficulty of potential consequence arises, however, in terms of the National Guard. The title makes provision for pay and allowances to members of the Army National Guard and the Air National Guard when they are in Federal service. (See, for example, 37 U.S.C. 204(c), (d), and (h).) As a result of 1972 and 1980 amendments for the Virgin Islands and Guam, respectively, the several definitions of National Guard

comprehend units from the Virgin Islands and Guam (37 U.S.C. 101(6)-(10)). The analysis of the National Guard Title of the Code (Memorandum No. 32-1) concludes that Army and Air National Guard units may be established in the Virgin Islands and Guam, where they are now in fact established; and by operation of section 502(a)(2) of the Covenant, National Guard units are authorized to be established in the Northern Marianas. The references to Guam in the Title 37 definitions pertaining to the National Guard, however, were not added until 1980. Section 502(a)(2) of the Covenant cannot, therefore, serve to extend to the Northern Marianas the pertinent provisions of Title 37 on the ground that they are applicable to Guam, because section 502(a) applies only to laws in effect and applicable to Guam on January 9, 1978. Hence, at such time as National Guard units are created in the Northern Marianas, it will become necessary to amend the pertinent definitions at 37 U.S.C. 101 (7) and (9), so as to provide appropriate treatment whenever such units are Federalized.

Conclusion: Title 37 contains no provisions that require modification in order to accommodate the territories, except that its definitions of the terms "Army National Guard" and "Air National Guard" should be expanded to include the Northern Marianas, at least at such time as National Guard units are established there.

Federal agency comments: Comments were requested from the National Guard Bureau. All comments received have been reflected above.

Title 38 - VETERANS' BENEFITS

- * Contains matters of particular interest to the territories, but no legislative recommendations.

Memorandum
Number

Subject

38 U.S.C.
sections

38-1

* Veterans' Benefits

101-5228

Subject: Title 38 of the United States Code^{1/}
Veterans' Benefits 38 U.S.C. 101-5228

Comment: The laws pertaining to veterans' benefits do not require modification to meet the requirements of the territories or of veterans residing in the territories.

Discussion: An examination of the laws contained in Title 38 reveals no provisions under which the territories, or veterans resident in them, are treated unfairly or otherwise inappropriately. In two instances discussed below the territories are treated differently from the States, but this is not inappropriate.

For the most part, the laws of Title 38 confer benefits on individuals--on veterans and their survivors--which turn on their military service and not on their place of residence; or they confer authority upon the Veterans' Administration to provide services. There is no distinction made as to whether the veterans are State or territorial residents, nor are the territories, as such, treated differently from the States, as such (with the untroubling exceptions discussed below). The term "State" is defined to include the "Territories, and possessions" (38 U.S.C. 101(20)), so that in the numerous instances in which State action is required (as, for example, in connection with approval of institutions and courses in connection with educational benefits for veterans, 38 U.S.C. 1771), the territories are fully comprehended, as though they were States.

^{1/} Given the subject matter of Title 38, it is unnecessary to discuss its content chapter-by-chapter. The title is divided into 85 chapters that are organized in the following six parts: Part I, General Provisions, 38 U.S.C. 101-246; Part II, General Benefits, 38 U.S.C. 301-1008; Part III, Readjustment and Related Benefits, 38 U.S.C. 1501-2026; Part IV, General Administrative Provisions, 38 U.S.C. 3001-3505; Part V, Boards and Departments, 38 U.S.C. 4001-4208; and Part VI, Acquisition and Disposition of Property, 38 U.S.C. 5001-5228.

In one instance, appearing at 38 U.S.C. 2001(6), the term "State" is given a potentially more limited definition. For purposes of that chapter of Title 38, pertaining to job counseling, training, and a placement service for veterans, the term "State" is defined to include "Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Marianas", and the Trust Territory--but only "to the extent determined necessary and feasible". The chapter provides for a State Director for Veterans' Employment, and an Assistant Director, serving under the U.S. Secretary of Labor (38 U.S.C. 2003), and it is reasonable to suppose that the number of veterans in the four territories may be too small to warrant such individual, official machinery.^{2/} The Veterans' Administration, however, is authorized to establish regional offices and field offices "within the United States, its Territories, Commonwealths, and possessions" (38 U.S.C. 230(a)), and to establish veterans assistance offices in the "territories and possessions" (38 U.S.C. 242(a)).

The two exceptions referred to above relate to (1) "State homes" and to (2) treatment of veterans in private facilities under contract with the VA. Given the factual situation in each of the current territories, the treatment accorded the territories is not unfair:

(1) The term "State home" is defined as a home for disabled veterans, "established by a State (other than a possession)" (38 U.S.C. 101(19)). The term is used in connection with VA payments for the care of veterans in such State homes (38 U.S.C. 641-643), and in connection with State homes for nursing and domiciliary care (38 U.S.C. 5031-5037). None of the territories has a territorial veterans' hospital or facility for these purposes, nor, given the numbers of resident-veterans, are they likely to do so. Their exclusion is thus not inappropriate.

^{2/} According to a Senate Committee report dated May 15, 1978 (reprinted at 1978 U.S. Code Cong. and Admin. News 4168, 4184), the number of Veterans' Administration beneficiaries in Guam was then 781; Samoa, 285, and the Virgin Islands, 631. The number in the Northern Marianas would unquestionably be far fewer than any of these.

(2) Under 38 U.S.C. 601(4)(C), the Veterans' Administrator may, in the case of veterans in a noncontiguous "State", utilize the services on a contract basis of a "private facility" for hospital care for nonservice connected disabilities or for outpatient services designed to obviate hospital admission, if VA or other Government facilities are unavailable--but only if the use of a private facility is "consistent with the patient load or incidence of the provision of medical services" at VA hospitals within the contiguous States (38 U.S.C. 601(4)(C)(v)). Subject to that condition, the use of contract facilities for veterans in the Virgin Islands, Guam, Samoa, and the Northern Marianas is thereby permitted, because they are defined as "States" for purposes of Title 38 (38 U.S.C. 101(20)). Until late 1985, the condition with respect to hospital patient loads and incidence of provision of services could be waived as to veterans in the Virgin Islands and Puerto Rico "if necessary to prevent hardship", but pursuant to section 102(a) of Public Law 99-166, approved December 3, 1985, the waiver has been eliminated as to the Virgin Islands (and the contract authority with respect to Puerto Rico is required to be phased out over a three-year period). The legislative history shows that the waiver for Puerto Rico was originally enacted because of the "apparent inadequacy of non-VA public medical facilities" there, and the Virgin Islands were added because they were under the jurisdiction of the VA office in Puerto Rico (1978 U.S. Code Cong. and Admin. News 4168, 4186). As of late 1985, however, Puerto Rico is en route to being eliminated altogether as to the contract authority; the hardship-waiver authority for the Virgin Islands has ceased; and the contract authority is permanent with respect to all of the territories subject to this study--the Virgin Islands, Guam, Samoa, and the Northern Marianas. Owing to their "geographic inaccessibility" (38 U.S.C. 601(4)(C)), among other things, this result is appropriate. These territories, along with the noncontiguous States of Alaska and Hawaii, are accorded the same treatment.

Some further observations on Title 38 in general may be warranted:

-- Title 38 makes provision for the conferring of certain benefits upon individuals who have served in unusual military units. See, for example, provisions concerning the Philippine Scouts, at 38 U.S.C. 107 and elsewhere. For several decades individuals in the territories, particularly in Guam and American Samoa, have argued that they should receive benefits for their service that was related to U.S. military activities. None, however, has ever presented sufficient facts to warrant an official effort to expand pertinent laws to include them. But there is precedent in Title 38 to do so, when the military service performed warrants that result.

-- It is probable that the land alienation laws and customs in American Samoa, and possibly in the Northern Marianas as well, could foreclose the practical usefulness of some veterans' benefits programs there. Housing loans to veterans, for example (38 U.S.C. 1801, et seq.) are dependent upon fee simple land ownership, a condition that is very hard to achieve in Samoa. But it would seem impractical to modify veterans' housing loan laws to accommodate the unique (to the American legal system) Samoa land laws--and in any event not necessary in the absence of a need that has not been established.

-- Finally, in three instances the term "citizen" of the United States appears, a term that does not now include the people of the Northern Marianas or U.S. nationals in American Samoa. The problem has been overcome by Proclamation 5207 of June 7, 1984, as to the people of the Northern Marianas, because that Proclamation in effect causes Northern Marianas citizens to be regarded as U.S. citizens during the period preceding trusteeship termination, as to those three sections, among others. (See, secs. 2(g) and 6(g)) of Proclamation 5207). The Samoan problem remains, but it is unlikely to constitute a real one, given the content of those three sections: 38 U.S.C. 235, pertaining to employees of the VA who are assigned to the Philippines: 38 U.S.C. 4105, pertaining to VA appointees to its Department of Medicine and Surgery; and 38 U.S.C. 624, pertaining to medical services to veterans in foreign areas.

Conclusion: Title 38 requires no modification to meet the needs of the territories.

Federal agency comments: Comments were invited from the Veterans' Administration and the Department of Justice. All comments received are reflected above.

Title 39 - POSTAL SERVICE

** Contains recommendations for changes in the law.

Memorandum
Number

Subject

39 U.S.C.
sections

39-1

** Postal Service

101-5605

Subject: Title 39 of the United States Code
Postal Service^{1/}

Purpose: To provide public postal services "to the people by the Government of the United States," so as "to bind the Nation together through the personal, educational, literary, and business correspondence of the people" (39 U.S.C. 101(a)).

Territorial application: The postal services provided by the Title apply as fully in the Virgin Islands, Guam, Samoa, and the Northern Marianas as in the States of the United States.

Recommendation: The recommendation by the Northern Marianas Federal Laws Commission for a legislative change pertaining to the use of the mails in connection with lotteries is not adopted here. But the absence in American Samoa of a court with the jurisdiction of a Federal district court means that enforcement of certain postal laws is impossible there, and this defect ought to be remedied.

Discussion: Four matters warrant discussion: (1) the territorial application of Title 39; (2) lottery laws; (3) enforcement in Samoa; and (4) postal services in post-trusteeship Micronesia.

(1) Territorial application. It is probable that the work of the Postal Service affects the people of the United States more directly and more frequently than does the work of any other part of the Federal establishment--yet there is surprisingly little in Title 39 that describes the geographical dimensions of its service. But that which appears is quite sufficient to make clear that the people of

^{1/} Given the content of this Title, it does not seem necessary to analyze it on a chapter-by-chapter basis. The chapters are divided into the following five parts: Part I, General, secs. 101-606; Part II, Personnel, secs. 1001-1209; Part III, Modernization and Fiscal Administration, secs. 2001-2605; Part IV, Mail Matter, secs. 3001-3685; and Part V, Transportation of Mail, secs. 5001-5605.

the territories are entitled to the same full service that the people of the States receive. Section 403(a) of Title 39 states that

The Postal Service shall receive, transmit, and deliver throughout the United States, its territories and possessions . . . written and printed matter, parcels, and like materials . . .

No other provision of the existing postal laws relates to geographic application.

Before the enactment into positive law of the current Title 39 in 1970, there appeared the following:

Sec. 2. Application. This title has the same force and effect within Guam as within other possessions of the United States.

That section 2 was part of a 1960 enactment into positive law of the postal laws, but there were then (in 1960) no provisions stating the application of the postal laws to any such "other possessions," so the genesis of the former 39 U.S.C. 2 bears looking into.

It appears, first, that in connection with research performed for the 1950 Commission on the Application of Federal Laws to Guam, the then Post Office Department initially concluded that the postal laws applied fully to the then new territory. Later in 1951, however, that Department concluded that it would be wiser to provide for an express extension, and it so advised the Guam Commission. (See Resource Material Used in the Preparation of the Report of the Commission on Application of Federal Laws to Guam, Committee Print of the House Interior and Insular Affairs Committee, 1952, p. 13, where the initial position is reported, but not the 1951 revision.) The Guam Commission accepted the initial position and so reported (H. Doc. 212, 82d Cong., p. 22). But the Post Office Department

apparently adhered to its revised 1951 view, and later, as part of the Postal Policy Act of 1958, the express extension of the postal laws to Guam was achieved (Pub. L. 85-426, sec. 405, approved May 27, 1958). The explanation as to the need for the Guam provision that appears in the legislative history was tied to section 25(b) of the Guam Organic Act, which at the time in question provided that certain Federal laws applied to Guam only if they expressly referred to "Guam" or if they used the term "possessions." (Act of Aug. 1, 1950, 63 Stat. 384, 391; 1958 U.S. Code Cong. and Admin. News 2503, 2561). That mischiefmaking section was not repealed until 1968 (by section 7 of Public Law 90-497). By 1970, therefore, when the postal laws were again revised, it was possible to eliminate the particular provision for Guam, and to treat all of the "territories and possessions" in the same manner. And that was done by 39 U.S.C. 403(a), quoted above. Revision tables for Title 39 show that the old section 2 is now understood to be comprehend by section 403.

(2) Lotteries. The postal laws define as "nonmailable" materials associated with "the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind" (39 U.S.C. 3005(a)). Included in the category of the nonmailable would be lottery tickets and newspapers carrying advertisements about the lottery--or bingo games, or other games of chance. Criminal penalties provided for elsewhere in the Code (see Memorandum No. 18-1) are imposed for violations of these provisions. Lotteries conducted under the laws of the State, territory, or possession, however, are exempt from these provisions (39 U.S.C. 3005(d)).

The Northern Marianas Commission on Federal Laws observed in its August 1985 report,

Bingo, raffles, lotteries, and other games of chance are popular and widespread in the Northern Mariana Islands. Funds are raised for a variety of charitable and other worthwhile purposes through these means. (p. 132)

Accordingly, the Northern Marianas Commission recommended that the Northern Marianas be given a partial exemption from 39 U.S.C. 3005, to be confined to lotteries conducted by nonprofit organizations for religious, charitable, educational, or benevolent purposes, and that companion amendments to Title 18 also be enacted (Report, pp. 131-135). If these recommendations were to be implemented, it should be noted that the same exemptions should be provided for Guam, where lotteries are similarly in use for charitable purposes.

However, it is not here recommended that these exemptions be provided. The Department of Justice, in a letter to Interior dated December 23, 1987, has stated its opposition to such exemptions, principally because the same argument for exemptions could be made for the States. (See the discussion in Memorandum No. 18-1 concerning 18 U.S.C. 1301-1307.) The law, therefore, should remain unchanged.

(3) Enforcement in Samoa. Sections 3001 through 3011 of Title 39 deal with various kinds of nonmailable matter, in addition to lottery materials considered above--including, for example, money-making schemes involving false representations, pandering advertisements, unordered merchandise. Enforcement responsibility is given generally to courts with the jurisdiction of U.S. district courts, and as is frequently the case, that means that there is no court of competent jurisdiction in Samoa.

The descriptive terms vary in these sections:

- 39 U.S.C. 3001(k) grants jurisdiction to the "district courts, together with the District Court of the Virgin Islands and the District Court of Guam . . .";
- 39 U.S.C. 3007(a) refers to "the United States district court in the district in which the defendant receives his mail . . ."; and

-- 39 U.S.C. 3008(e) and 3011(a) each refer simply to a "district court of the United States."

There should be no difficulty in concluding that the U.S. District Courts in the Virgin Islands, Guam, and the Northern Marianas all qualify under any of these phrases. By operation of section 502(a)(2) of the Covenant, the District Court of the Northern Marianas has under these sections the same jurisdiction as the District Court of Guam; and the charters of all three of these courts grant to them the jurisdiction of a District Court of the United States.

But there is, of course, no similar court in Samoa, and no Federal District Court with jurisdiction in Samoa. The possible solutions to the problem are numerous, including the creation of a district court for the territory, or the extension of jurisdiction of an existing district court to include Samoa. Because postal services are both important and constant, the issue of court jurisdiction in Samoa should be resolved without undue delay.

(4) Postal service in post-trusteeship Micronesia. During the trusteeship period for the Trust Territory of the Pacific Islands, the United States has provided postal services throughout the Trust Territory on the same basis--i.e., a domestic basis--as in the U.S. States and territories. The Compact of Free Association in section 221(3) provides for the continuation of that service to the Freely Associated States during the Compact period, as detailed in a subsidiary agreement and in further agreements between the U.S. and the Freely Associated States. The effect of the pertinent subsidiary agreement, which is Article VI of the Federal Programs and Services Agreement, and of the further agreements pursuant to it, is to relieve the United States of all postal responsibilities except for the carriage of mail to and from each of the Freely Associated States and any point outside of them. Each of the States is responsible for its own internal postal system. Congressional approval of the Compact of Free Association constitutes the basis for this shared responsibility. There is, of course, no U.S. District Court in any of the Freely Associated States, and no U.S.

court with jurisdiction in any of them; but given the postal scheme contemplated by the Compact, these States will be similar to any other foreign area, so the absence of a Federal court is no defect.

Conclusion: The postal laws require no modification to meet the needs of the territories, except that the absence of a court with enforcement jurisdiction in Samoa requires attention.

Federal agency comments: Comments were invited from the Postal Service. All comments received have been reflected above.